



**STORIES OF PERVASIVE UNCERTAINTY:
A VICTIM-FOCUSED ANALYSIS OF VICTIM IMPACT
STATEMENTS AND SENTENCING IN SEXUAL OFFENCE
CASES**

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DECLARATIONS

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This thesis contains no material which has been accepted for a degree or diploma by the University or any other institution, except by way of background information and duly acknowledged in the thesis, and to the best of my knowledge and belief no material previously published or written by another person except where due acknowledgement is made in the text of the thesis, nor does the thesis contain any material that infringes copyright.

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22 December 2017

ABSTRACT

Victim impact statements outline the harm caused to victims by the offending committed against them. These statements were introduced across Australia from the 1980s as part of legislative and policy reforms that were designed, at least in part, to address barriers contributing to high attrition rates for sexual offence prosecutions, and to reduce anti-therapeutic aspects of victim involvement in the criminal justice process. Yet little research has been undertaken to explore impact statements in the context of sexual offending. Previous research has generally excluded victims of sexual assault, not distinguished their experiences from those of other victims, or not involved interviews with victims themselves.

This thesis discusses findings from an empirical study of impact statements and sentencing from the perspective of victims of sexual offending from four Australian jurisdictions. Analyses of sentencing transcripts and interviews with victims and justice professionals reveal four key findings and produce four original contributions to knowledge. The first is the discovery of a lack of understanding among justice professionals, and the victims with whom they work, as to the actual purpose of victim impact statements. Consequently, a model has been developed to achieve clarity and consistency in impact statement purpose and use across the research jurisdictions. The second finding is that the operation of victims' rights instruments in some jurisdictions creates problems around the provision of information to victims. This may be further compounded by the third finding, namely that justice professionals appear to lack training in skills for communicating effectively with victims. In response, recommendations are made for the reform of victims' rights instruments, and strategies are provided to improve communication between professionals and victims of crime. The fourth finding is the identification of different judicial approaches when acknowledging victims and their impact statements at sentencing. This has generated recommendations for educative processes to assist judges to develop a clearer understanding of the possible therapeutic and anti-therapeutic consequences of this acknowledgment.

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TABLE OF CONTENTS

Chapter 1: Introduction	1
I Research Purpose.....	1
II Research Context.....	2
A <i>Sexual Offending and the Australian Justice System</i>	2
B <i>The Justice Needs of Victims of Sexual Offending</i>	3
C <i>A Brief Introduction to Victim Impact Statements</i>	4
IV Research Aims.....	7
V Research Scope.....	8
VI Research Approach	8
VII Research Lens.....	8
VIII A Note on the Terminology.....	11
A <i>The term ‘victim’</i>	11
B <i>The terms ‘healing’, ‘closure’ and ‘therapeutic benefits’</i>	11
IX Thesis Structure	12
Chapter 2: Victim Participation in Sentencing: A Review of the Literature	15
I Introduction.....	15
II The Historic Role of the Victim.....	16
III Victims’ Needs and the Development of Victims’ Rights.....	18
IV Victim Impact Statements and the Modern Role of the Victim.....	20
V What Are the Possible Purposes of Victim Impact Statements?	22
VI Victim Impact Statements: Previous Empirical Research.....	25
A <i>Objections on Procedural Grounds</i>	25
B <i>Objections Based on Concerns about the Content of Victim Impact Statements</i>	27
C <i>Objections Based on Concerns for Victims</i>	31
VII Why Do Victims Submit Impact Statements?	34
VIII How Do Victims Feel after Submitting their Impact Statement?	35
IX Victim Impact Statements and Victims of Sexual Offending	39
X Judicial Acknowledgment of Victim Impact Statements	41
XI Conclusion and Summary of Research Gaps.....	44
Chapter 3: Victim Impact Statements: A Review of Legislative Principles and Policies	47

I	Introduction.....	47
	A <i>Sources of Impact Statement Law and Policy</i>	48
II	Definition of ‘Victim’	49
III	Victim Recognition and Sentencing Legislation in Australia.....	49
IV	Content of Victim Impact Statements.....	52
V	Timeframes for Preparing Victim Impact Statements	54
VI	Presenting Victim Impact Statements.....	56
VII	Alternative Arrangements for Verbal Presentation.....	57
VIII	Admissibility of Victim Impact Statements.....	59
IX	Dealing with Inadmissible Materials	60
X	Rules for Cross-Examination	63
XI	Therapeutic Value of Victim Impact Statements	64
XII	The Absence of Victim Impact Statements	65
XIII	Conclusion	66
	Chapter 4: Research Approach	68
I	Introduction.....	68
II	Research Aims and Theoretical Lens.....	69
III	Choosing the Research Approach.....	70
	A <i>Content Analysis as a Research Method</i>	71
	B <i>Interviews as a Research Method</i>	72
	C <i>Choosing Research Jurisdictions</i>	72
IV	Interviews with Victims and Justice Professionals.....	73
	A <i>The Research Participants</i>	73
	B <i>Ethical Issues in Conducting Research with Victims of Sexual Offending</i>	74
	C <i>Preparing for the Interviews</i>	76
	D <i>Identifying Victim Participants</i>	77
	E <i>Recruiting Victim Participants</i>	78
	F <i>Recruiting Justice Professionals</i>	80
	G <i>Conducting the Interviews</i>	82
V	Interview Analysis	83
	A <i>The Interview Transcripts</i>	83
	B <i>Coding the Interview Transcripts</i>	83
VI	Sentencing Remarks Analysis.....	85
	A <i>The Sentencing Remarks</i>	85
	B <i>Coding the Sentencing Remarks</i>	87
VII	Limitations of the Research	88

VIII Conclusion	90
Chapter 5: Judicial Use of Victim Impact Statements in Sentencing: A Critique of Current Practice.....	92
I Introduction.....	92
II The Wider Sentencing Context.....	95
III Benefits of Judicial Acknowledgment.....	96
A <i>Benefits to Victims</i>	96
B <i>Benefits to Others</i>	97
IV Content Analysis Findings.....	98
A <i>Problems Arising from Minimal Reference to Victim Harm</i>	99
B <i>The Challenge of Quantifying Therapeutically Effective Levels of Victim Acknowledgment</i>	102
C <i>Cases with No Impact Statement Submitted</i>	114
D <i>Judicial Reference to Instrumental and Expressive Purposes of Statements</i> ..	116
V Educating Judges on the Therapeutic Outcomes of Acknowledging Victims at Sentencing.....	117
A <i>Recommendation 1: The Publication of a Victim-Focused Benchbook</i>	117
B <i>Recommendation 2: The Introduction of Victim-Focused Pre-Sentencing Hearings</i>	118
VI Conclusion	119
Chapter 6: Victim Impact Statements: Balancing Expressive and Instrumental Approaches	121
I Introduction.....	121
II The Purpose of Victim Impact Statements	122
A <i>The Manikis Model</i>	126
III The Content and Reliability of Victim Impact Statements.....	129
A <i>Impact Statement Content</i>	129
B <i>Impact Statement Reliability</i>	137
IV Timeframes for Completing Victim Impact Statements	140
V The Presentation of Victim Impact Statements	142
A <i>Impact Statement Form</i>	142
B <i>Verbal Submission of Statements</i>	143
C <i>Written Submission of Statements</i>	145
D <i>Presentation Using Vulnerable Witness Provisions</i>	146
VI Summary of the Proposed Australian Model	149

VII	Choosing Not to Submit an Impact Statement	155
VIII	Conclusion and Recommendations	157
Chapter 7: Victim Experiences of Impact Statements and Sentencing: Challenges of Communication with Victims of Crime 161		
I	Introduction	161
II	Victims' Need for and Right to Information	162
III	Provision of Information: Problems Arising in Practice	164
	<i>A Information about the Justice Process</i>	164
	<i>B Information about Sentencing</i>	167
	<i>C Identifying Potential Communication Barriers</i>	169
IV	Communicating Information to Victims of Crime	169
	<i>A Who is Responsible for Providing Information?</i>	169
	<i>B Communication Barriers that May Prevent Effective Information Sharing</i> ...	172
V	Evidence-Based Solutions to Identified Communication Barriers	176
	<i>A Effective Verbal Communication Skills</i>	176
	<i>B Effective Visual Communication</i>	178
VI	Supplementary Strategies for Improving Communication with Victims of Crime	182
	<i>A Automated Notification Systems</i>	183
	<i>B Victim Liaison Services</i>	183
VII	Conclusion.....	185
Chapter 8: Conclusion and Discussion of Recommendations for Reform..... 188		
I	Introduction	188
II	Achieving Research Aim 1: Gaining a Better Understanding of Victim Perspectives of Impact Statements and Sentencing	190
	<i>A Finding 1: The Unclear Purpose of Victim Impact Statements</i>	191
	<i>B Finding 2: Problems Affecting Victims' Right to Information</i>	193
	<i>C Finding 3: Communication Barriers between Justice Professionals and Victims</i>	195
III	Achieving Research Aim 2: Identifying Current Judicial Sentencing Practice.....	196
	<i>A Finding 4: Current Judicial Practice around the Acknowledgment of Victims at Sentencing</i>	196
IV	Limitations of the Research.....	198
V	Future Research Directions	199
VI	Conclusion: Implications for Victim Impact Statement Policy and Practice	200

Bibliography.....	202
A <i>Articles/Books/Reports</i>	202
B <i>Cases</i>	215
C <i>Legislation</i>	218
D <i>Treaties</i>	219
E <i>Other</i>	219
 Appendix 1: Previous Interview and Survey Research with Adult Victims on Sentencing and Victim Impact Statements.....	 223
 Appendix 2: Table of Case Characteristics by Jurisdiction	 230
I ACT	230
II South Australia.....	233
III Tasmania.....	236
IV Victoria.....	238
 Appendix 3: Availability of Sentencing Remarks in Australia	 243
 Appendix 4: Project Information Sheet for Victim Participants.....	 246
 Appendix 5: Consent Form for Victim Participants	 250
 Appendix 6: Project Information Sheet for Justice Professional Participants	 253
 Appendix 7: Consent Form for Justice Professional Participants	 257
 Appendix 8: Victim Participant Interview Schedule.....	 260
 Appendix 9: Justice Professional Interview Schedule.....	 263

CHAPTER 1:

INTRODUCTION

I Research Purpose.....	1
II Research Context.....	2
A <i>Sexual Offending and the Australian Justice System</i>	2
B <i>The Justice Needs of Victims of Sexual Offending</i>	3
C <i>A Brief Introduction to Victim Impact Statements</i>	4
IV Research Aims.....	7
V Research Scope.....	8
VI Research Approach	8
VII Research Lens.....	8
VIII A Note on the Terminology.....	11
A <i>The term ‘victim’</i>	11
B <i>The terms ‘healing’, ‘closure’ and ‘therapeutic benefits’</i>	11
IX Thesis Structure	12

[Victims] feel uninformed, they don’t understand the [justice] process, they feel out of control within the process in terms of how long it takes, what happens, and what their role is within it. I think it’s a real problem. I think it re-traumatises the vast majority of victims who have experienced sexual assault, by the nature of how the process operates. (Trish, Victim Support Officer, Victoria)

I RESEARCH PURPOSE

The physical and psychological effects of sexual offence victimisation can be traumatic, complex, and prolonged.¹ But unlike victims of many other types of offences, victims of sexual offending are also likely to be subject to further

¹ See, eg, Zoe Morrison, Antonia Quadara and Cameron Boyd, “‘Ripple Effects’ of Sexual Assault’ (Australian Centre for the Study of Sexual Assault, Report No 7, 2007); Liz Wall and Antonia Quadara, ‘Acknowledging Complexity in the Impacts of Sexual Victimization Trauma’ (Australian Centre for the Study of Sexual Assault, Report No 14, 2014).

trauma because of their experience of the criminal justice system.² Consequently, victim impact statements were introduced in Australia from the 1980s, among reforms intended to address the re-traumatisation of sexual offence victims,³ and to reduce ‘many of the anti-therapeutic tendencies entailed by [victim] involvement in [criminal justice] proceedings.’⁴ These statements are prepared by the victim prior to sentencing, and outline the harms caused to them as a consequence of the offending.⁵ Despite being introduced, in part, to address problems arising from the justice system experience of victims of sexual offending, subsequent impact statement research has generally excluded victims of sexual offending, has not distinguished their experiences from those of other crime victims, and has not involved interviews with victims themselves.⁶ This thesis begins to address this dearth of research by examining the impact statement experiences of victims of sexual offending specifically.

II RESEARCH CONTEXT

A Sexual Offending and the Australian Justice System

Sexual offending is ‘often under-reported and may be unrecorded.’⁷ The Australian Bureau of Statistics has explained that while this makes it difficult to

² Kate Warner, ‘Sexual Offending: Victim, Gender and Sentencing Dilemmas’ in Duncan Chappell and Paul Wilson (eds), *Issues in Australian Crime and Criminal Justice* (LexisNexis Butterworths, 2005) 236.

³ Australian Law Reform Commission, *Family Violence—A National Legal Response* (Report 114, 2010) 1197, 1209.

⁴ Edna Erez, Peter R Ibarra and Daniel M Downs, ‘Victim Welfare and Participation Reforms in the United States: A Therapeutic Jurisprudence Perspective’ in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Carolina Academic Press, 2011) 37.

⁵ Victim impact statements are referred to by different names in different jurisdictions. They are, for example, called victim impact statements in Australia but called victim personal statements in England and Wales. While the acronyms ‘VIS’, ‘VISs’, ‘VPS’ and ‘VPSs’ are often used in other published research, the terms ‘victim impact statement’, ‘impact statement’, and ‘statement’ will be used in this thesis to refer to victim input schemes in all jurisdictions.

⁶ Karen-Lee Miller, ‘Purposing and Repurposing Harms: The Victim Impact Statement and Sexual Assault’ (2013) 23(11) *Qualitative Health Research* 1445, 1445.

⁷ Australian Bureau of Statistics, ‘Defining the Data Challenge for Family, Domestic and Sexual Violence’ (Cat No 4529.0, 2013) 7; Carolyn Hoyle and Lucia Zedner, ‘Victims,

measure the prevalence of sexual offending within the Australian community, 'the available evidence suggests that most victims of sexual violence do not report the crime to police.'⁸ There are a number of reasons for such low reporting. One of these is the 'significant emotional stress'⁹ that may be experienced as a consequence of involvement in legal proceedings. This, as Herman has noted, affects 'even the most robust citizen.'¹⁰ But for victims of sexual offending, who are likely to have experienced psychological trauma as a result of the offending,¹¹ 'involvement in the justice system may compound the original injury.'¹²

B *The Justice Needs of Victims of Sexual Offending*

While there are no simple solutions to improve the criminal justice experience of sexual offence victims, legal and policy reforms over the past 30 years have been intended, at least in part, 'to address factors and barriers'¹³ that contribute to high attrition rates for the prosecution of sexual offences,¹⁴ and to address the identified justice needs of many victims.¹⁵ Daly¹⁶ has explained that these include:

Victimization and Criminal Justice' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (Oxford University Press, 4th ed, 2007) 464.

⁸ Australian Bureau of Statistics, above n 7, 7.

⁹ Judith Lewis Herman 'The Mental Health of Crime Victims: Impact of Legal Intervention' (2003) 16(2) *Journal of Traumatic Stress* 159, 159.

¹⁰ Ibid.

¹¹ Herman, above n 9, Hoyle and Zedner, above n 7, 468; Amanda Konradi, *Taking the Stand: Rape Survivors and the Prosecution of Rapists* (Praeger, 2007) 1.

¹² Herman, above n 9, 159.

¹³ Australian Law Reform Commission, above n 3, 1187.

¹⁴ Bronwyn Naylor, 'Effective Justice for Victims of Sexual Assault: Taking up the Debate on Alternative Pathways' (2010) 33(3) *University of New South Wales Law Journal* 662.

¹⁵ Michael O'Connell, 'The Evolution of Victims' Rights and Services in Australia' in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Springer, 2015).

¹⁶ Daly prefers the term 'victims' justice interests': Kathleen Daly, 'Reconceptualizing Sexual Victimization and Justice' in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Routledge, 2014) 388.

- The need to participate in the justice process, which includes being provided with information about developments of the case as it progresses;¹⁷
- The need for voice, including the ability to share the story of what has happened in a public setting, where the victim can receive public recognition and acknowledgment;¹⁸
- The need for validation, involving affirmation that the victim is believed;¹⁹ and
- The need for vindication, involving the recognition that what happened to the victim was wrong.²⁰

Others have echoed Daly's list, but highlighted the particular trauma that may be experienced by victims of sexual offending as a consequence of the criminal justice process.²¹ Accordingly, the need to be treated with respect,²² and to feel a sense of control over their experience of the justice process,²³ have also been emphasised in the context of victims of sexual offending.

C A Brief Introduction to Victim Impact Statements

As part of legal and policy reforms intended to meet victims' justice needs, including participation and voice, and to improve victims' experiences of the justice process, victim impact statements were introduced to increase the role of

¹⁷ See also Joanna Shapland, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Gower, 1985) 78.

¹⁸ See also Denise Lievore, 'No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault' (Research Report, Australian Institute of Criminology, June 2005).

¹⁹ See also Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice* (Research Report 27, Australian Institute of Family Studies, April 2014).

²⁰ See also Judith Lewis Herman, 'Justice From the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571.

²¹ Haley Clark, "'What Is the Justice System Willing to Offer?' Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) (Family Matters No 85, Australian Institute of Family Studies, 2010); Marie Keenan, 'Criminal Justice, Restorative Justice, Sexual Violence and the Rule of Law' in Estelle Zinsstag and Marie Keenan (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (Routledge, 2017) 44.

²² See, for example, S Payne, *Rape: The Victim Experience Review* (Home Office UK, 2009); Clare McGlynn, 'Feminism, Rape and the Search for Justice' (2011) 31(4) *Oxford Journal of Legal Studies* 825.

²³ Bluett-Boyd and Fileborn, above n 19; Clark, above n 21.

victims at sentencing. When first legislated for in several jurisdictions around the world during the 1980s, research into impact statement schemes was prolific and a number of authors undertook empirical research to investigate the consequences of their implementation. Studies aimed to identify issues such as the financial and time implications of the schemes,²⁴ the effect that the submission of impact statements had on sentence length and type,²⁵ the reasons why victims chose to participate in impact statement schemes,²⁶ and victim satisfaction levels following the submission of their statements.²⁷

Since then, research on victim participation in the sentencing process has continued sporadically, and in recent times has become an increasing priority for Australian governments. For example, in November 2016, the Victorian Law Reform Commission published its final report on the role of victims in the criminal trial process,²⁸ and in May 2017, the New South Wales (NSW) Sentencing Council announced the establishment of a review to explore the nature and extent of victims' involvement in sentencing, with the goal of minimising victims' distress in proceedings.²⁹

²⁴ See, for example, Edna Erez, Leigh Roeger and Frank Morgan, 'Victim Impact Statements in South Australia: An Evaluation' (Office for Crime Statistics, South Australian Attorney-General's Department, 1994).

²⁵ See, for example, Edna Erez and Pamela Tontodonato, 'The Effect of Victim Participation in Sentencing on Sentence Outcome' (1990) 28(3) *Criminology* 451; Robert C Davis and Barbara E Smith, 'The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting' (1994) 11(3) *Justice Quarterly* 453.

²⁶ See, for example, Carolyn Hoyle et al, *Evaluation of the 'One Stop Shop' and Victim Statement Pilot Projects* (Home Office, Research Development and Statistics Directorate, 1998).

²⁷ See, for example, Fiona Leverick, James Chalmers and Peter Duff, *An Evaluation of the Pilot Victim Statement Schemes in Scotland* (Scottish Executive Social Research, 2007).

²⁸ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Final Report (August 2016).

²⁹ New South Wales Government Sentencing Council, *Victims' Involvement in Sentencing* <<http://www.sentencingcouncil.justice.nsw.gov.au/Pages/Current-projects/VIS/Victims.aspx>>; New South Wales Sentencing Council, *Victims' Involvement in Sentencing*, Consultation Paper (September 2017).

A key finding to emerge from recent research is that victims' satisfaction with their justice system experience tends to increase significantly when judicial officers acknowledge the harm victims have suffered, by making reference to the victim and the content of their impact statement during the sentencing process.³⁰ Further research suggests that many judicial officers are aware of this beneficial effect, and self-report their endeavour to make reference to, and consequently validate, victims' experiences when preparing their sentencing remarks.³¹ However, empirical research that explores actual judicial practice in acknowledging victims at sentencing has, previously, only been published by one author.³²

There has furthermore been little empirical research into victim participation in sentencing in the context of sexual assault.³³ As mentioned in Section I, impact statement research has generally excluded victims of sexual offending, or has not distinguished their experiences from those of other crime victims, or has not involved interviews with victims themselves.³⁴ Appendix A outlines previous interview and survey research on the sentencing and victim impact statement experiences of adult victims of crime. It demonstrates that only two previous research projects have focused specifically on victims of sexual offending. Accordingly, Du Mont, Miller and White have recommended that further

³⁰ Colin Meredith, Chantal Paquette and Canada Department of Justice, *Summary Report on Victim Impact Statement Focus Groups* (Policy Centre for Victim Issues, 2001); Edna Erez, 'Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings' (2004) 40 *Criminal Law Bulletin* 483; Cheryl Regehr and Ramona Alaggia, 'Perspectives of Justice for Victims of Sexual Violence' 2006(1) *Victims and Offenders* 33.

³¹ Michael O'Connell, 'Evolving Mechanisms for Engaging Victims in the Sentencing Process: Should Victims Have A Stronger Voice In Court?' (Paper presented at the Sentencing Principles Perspectives and Possibilities Conference, Canberra, February 2006); Victorian Victim Support Agency, 'A Victim's Voice: Victim Impact Statements in Victoria' (Victorian Government, October 2009).

³² See Tracey Booth, 'The Restorative Capacities of Victim Impact Statements: Analysis of the Victim—Judge Communication Dyad in the Sentencing of Homicide Offenders' (2014) 2(3) *Restorative Justice* 302. This study explored the victim impact statement experiences only of family victims of homicide.

³³ Janice Du Mont, Karen-Lee Miller and Deborah White, 'Social Workers' Perspectives on the Victim Impact Statements in Cases of Sexual Assault in Canada' (2008) 18(3) *Women and Criminal Justice* 1.

³⁴ Miller, above n 6, 1445.

research be undertaken by way of in-depth interviews with victims of sexual offending, to explore their experiences of victim impact statements and of the sentencing process.³⁵

IV RESEARCH AIMS

This thesis explores the findings from a number of in-depth interviews undertaken with victims of sexual offending to examine their experiences of victim impact statements and sentencing processes. It also analyses interviews on the same subject undertaken with justice professionals, including prosecutors, witness assistance, and victim support workers who work with victims throughout impact statement and sentencing processes. Further, the thesis examines judicial practice in relation to the use of impact statements at sentencing, through an analysis of sentencing transcripts from sexual offence matters. The research has three major aims:

1. To gain a better understanding of victim perspectives of victim impact statement and sentencing processes and procedures in sexual offence cases;
2. To explore judicial practice in relation to the use of and reference to victim impact statements at sentencing in sexual offence cases; and
3. To determine whether any recommendations can be made for policy or legislative reform, to achieve best practice for impact statement processes and procedures from a victim-focused perspective.

The victim impact statement experiences of victims of sexual offending have never been explored in this way, in Australia or elsewhere. Accordingly, this combination of research approaches will produce original insights into sexual offence victims' experiences of the impact statement process, before, during, and after sentencing. The recommendations made will have implications for victims' experiences of impact statement and sentencing processes, for judicial practice, and for the practice of justice professionals who regularly work with victims, including prosecutors, witness assistance officers, and victim support officers.

³⁵ Du Mont, Miller and White, above n 33.

V RESEARCH SCOPE

The research focuses on four Australian jurisdictions, namely the Australian Capital Territory (ACT), South Australia, Tasmania and Victoria. These jurisdictions have been selected due to their provision of published sentencing remarks, as will be discussed in Chapter 4.³⁶ The literature relied upon throughout the thesis originates predominantly from Commonwealth countries, due to the ease of comparison between their adversarial systems of justice. Literature from the United States (US) is rarely relied upon, due to the significant focus in the US on the use of victim impact statements in the context of capital offences, which is not relevant to the Australian context.

VI RESEARCH APPROACH

The research approach is explored fully in Chapter 4. In summary, the research was conducted using a mixed methods design, including qualitative interviews with victims of sexual offending and a variety of justice professionals who are experienced in working with victims. These interviews were undertaken to ascertain and explore victims' expectations and actual experiences of impact statement and sentencing processes, and to identify the judicial approaches at sentencing they found to be beneficial or detrimental. A content analysis was also undertaken of judges' remarks when passing sentence, to determine the extent to which and how judicial officers acknowledge victim harm and the information in victim impact statements when sentencing, and to assess the extent to which current judicial practice in that regard meets victims' expectations and needs.

VII RESEARCH LENS

The lens of victim-focused therapeutic jurisprudence is brought to bear in analysing and discussing the research data for this thesis. A victim-focused approach was chosen for two reasons. First, because this research specifically concerns victims of sexual offending, only a victim focus will allow the

³⁶ See also Appendix 3, which outlines sentencing remark availability across Australia.

researcher to develop a comprehensive understanding of the nature and consequences of sexual victimisation. Secondly, this approach is required because of the nature and function of victim impact statements. As mentioned above, impact statements are inherently victim-focused instruments, as they were introduced to alleviate the re-traumatisation of victims that may be caused by the criminal justice process. Consequently, it is arguable that any research seeking to explore whether and how victim impact statement processes and procedures are working must be approached from a victim-focused perspective.

Therapeutic jurisprudence, which is a purposefully broad term,³⁷ was the chosen research lens because it has a law reform agenda.³⁸ It recognises that '[l]egal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces that, whether inten[tionally] or not, often produce therapeutic or anti-therapeutic consequences.'³⁹ In acknowledging that the justice system can have a 'far-reaching impact on those that become involved with it,'⁴⁰ including victims, therapeutic jurisprudence uses the 'tools of the social sciences to ... ascertain whether the law's anti-therapeutic effects can be reduced, and its therapeutic effects enhanced.'⁴¹ This may involve examining legal rules and 'legal practices and the way various legal actors — judges, lawyers, police officers, etc. — play their roles,'⁴² with the goal of 'restructur[ing] legal arrangements to ... maximize their potential for healing and rehabilitation.'⁴³

³⁷ Lauren Bennett Cattaneo and Lisa A Goodman, 'Through the Lens of Therapeutic Jurisprudence: The Relationship Between Empowerment in the Court System and Well-Being for Intimate Partner Violence Victims' (2010) 25(3) *Journal of Interpersonal Violence* 481, 482.

³⁸ Bruce J Winick, 'Therapeutic Jurisprudence and Victims of Crime' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Carolina Academic Press, 2011) 3.

³⁹ Bruce J Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3(1) *Psychology, Public Policy, and Law* 184, 185.

⁴⁰ Cattaneo and Goodman, above n 37, 482.

⁴¹ Winick, above n 39, 185.

⁴² Bruce J Winick, 'Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime' (2009) 33(3) *Nova Law Review* 535, 536.

⁴³ *Ibid.*

It is important to emphasise that therapeutic jurisprudence does not 'suggest that therapeutic goals should trump other ones,'⁴⁴ nor does it attempt to 'subordinate ... due process and other justice values'⁴⁵ or interfere with any established rights of others within the justice system, including the principle of fairness to the accused. Rather, it is 'a way of looking at the law in a richer way, and then bringing to the table some of these areas and issues that previously have gone unnoticed.'⁴⁶

Recent victim-focused reform research has often utilised a feminist legal perspective or restorative justice approach rather than a therapeutic jurisprudence lens. These three theoretical approaches share many common features, and this thesis explores many themes that are relevant to both feminist and restorative justice analyses.⁴⁷ However, the therapeutic jurisprudence lens was chosen because, in using the tools of the social sciences to focus attention on the harms and benefits that may be caused by the law or legal processes, as distinct from harms caused by the offending, it aligns most closely with the research aims of this thesis. In essence, this research seeks to identify legal processes that work, and those that do not, from a therapeutic, victim-focused perspective, and to make recommendations for change on this basis. While therapeutic jurisprudence has previously been criticised for being too focused on the defendant⁴⁸ rather than the victim,⁴⁹ it has more recently begun to focus on

⁴⁴ David Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 *Thomas M Cooley Law Review* 125, 125.

⁴⁵ Winick, above n 39, 185.

⁴⁶ Wexler, above n 44, 125.

⁴⁷ Michael King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014) 25.

⁴⁸ Andrew Cannon, 'Therapeutic Jurisprudence in the Magistrates Court: Some Issues of Practice and Principle' in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond* (A Collection of Refereed Papers from the 3rd International Conference on Therapeutic Jurisprudence, 2007) 129, 135; Elise C Lopez and Mary P Koss, 'The RESTORE Program for Sex Crimes: Differentiating Therapeutic Jurisprudence from Restorative Justice with Therapeutic Components' in Estelle Zinsstag and Marie Keenan (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (Routledge, 2017) 216.

⁴⁹ Robyn Holder, 'The Emperor's New Clothes: Court and Justice Initiatives to Address Family Violence' (2006) 16 *Journal of Judicial Administration* 30, 37.

victim experiences of the law.⁵⁰ Consequently, this thesis contributes to the growing application of therapeutic jurisprudence to issues of victims of crime⁵¹ by thinking creatively about how 'legal processes can be reshaped to ... maximize the potential for the healing of the victim.'⁵²

VIII A NOTE ON THE TERMINOLOGY

A *The term 'victim'*

It is important to acknowledge that the term 'victim' can be problematic, and that 'survivor' is often preferred when discussing sexual violence.⁵³ However, consistent with many law reform and legal policy documents, this thesis uses 'victim' because 'it is the term that the majority of agencies use and understand when referring to someone who has experienced victimisation, and is the term officially used in policies and legislation.'⁵⁴

B *The terms 'healing', 'closure' and 'therapeutic benefits'*

It is recognised that within victim-focused research, concepts such as 'healing', 'closure' and 'therapeutic benefits' have been subject to criticism on a number of bases. The vagueness of their meaning has been noted as a point of concern,⁵⁵ and issues of the generalisability of potential therapeutic outcomes have also

⁵⁰ Jo-Anne Wemmers, 'Victims in the Criminal Justice System and Therapeutic Jurisprudence: A Canadian Perspective' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Carolina Academic Press, 2011) 68.

⁵¹ Michael S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 30(3) *Melbourne University Law Review* 1096, 1117.

⁵² Winick, above n 42, 540.

⁵³ Oona Brooks and Michele Burman, 'Reporting Rape: Victim Perspectives on Advocacy Support in the Criminal Justice Process' (2017) 17(2) *Criminology and Criminal Justice* 209.

⁵⁴ Elaine Wedlock and Jacki Tapley, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims Commissioner for England and Wales, March 2016) 7.

⁵⁵ See, for example, Susan A Bandes, 'Victims, "Closure" and the Sociology of Emotion' (2009) 72(1) *Law and Contemporary Problems* 1; Jonathan Doak and Louise Taylor, 'Hearing the Voices of Victims and Offenders: The Role of Emotions in Criminal Sentencing' (2013) 64 *Northern Ireland Legal Quarterly* 25.

been raised. As Pemberton and Reynaers argued, general statements that concern the possible effects of particular criminal justice initiatives upon victims tend to disregard variations in victims' backgrounds, experiences, and psychological characteristics, all of which have the potential to effect their experience of victimisation as well as their experience of the criminal justice process.⁵⁶ Accordingly, it is noted that this thesis conceptualises the terms 'healing', 'closure' and 'therapeutic benefits' in a manner consistent with the approach of narrative psychology.⁵⁷ Narrative psychology is a practice that:

is founded on the premise that externalising traumatic experiences ... constitutes an effective coping mechanism for many people facing upheavals from major life-changing events, including violent crime. It follows that, if victims are given an outlet through which they can channel their emotions, they may be able to recover from the effects of victimisation more readily.⁵⁸

Consequently, where this thesis argues that therapeutic benefits may arise from victims' use of impact statements, this should be understood to mean that impact statements provide victims with an outlet through which they can share with the court, the offender, and the public, the harm caused to them by the offending. Consistent with the practice of narrative psychology, this outlet is expected to provide victims with the benefit of the potential for swifter recovery from the effects of victimisation.

IX THESIS STRUCTURE

Chapter 2 presents a literature review. It first outlines the development of victims' rights over the ages, including the right to present a victim impact statement. It then examines prior research conducted to evaluate impact

⁵⁶ Antony Pemberton and Sandra Reynaers, 'The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statements' in Edna Erez, Michael Kilchling, and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Carolina Academic Press, 2011).

⁵⁷ See, for example, Michael White and David Epston, *Narrative Means to Therapeutic Ends* (WW Norton and Co, 1990); Julia Vassilieva, *Narrative Psychology: Identity, Transformation and Ethics* (Palgrave Macmillan, 2016).

⁵⁸ Jonathan Doak, Ralph Henham and Barry Mitchell, 'Victims and the Sentencing Process: Developing Participatory Rights?' (2009) 29(4) *Legal Studies* 651, 667.

statement regimes, and identifies the gaps in the literature that this thesis begins to fill.

Chapter 3 reviews impact statement legislation, case law, policies and guidelines in Australia. It identifies, compares and contrasts current laws and policies relating to the preparation of victim impact statements and their presentation at sentencing. It focuses particularly on the jurisdictions in which the research for this thesis was conducted, and discusses mainly the legislation, case law, policies and guidelines that were identified as problematic in the interviews and the analysis of sentencing remarks.

Chapter 4 outlines the research approach undertaken for this thesis, including the justification of the research design, the ethical issues that arose in preparing to interview victims of sexual offending, the interview process and analysis, and the analysis undertaken of the sentencing remarks.

Chapter 5 is the first to present the research findings. It details an analysis of the transcripts of sentencing remarks in 100 sexual offence cases, which was undertaken to investigate judicial practice in relation to the use of, and reference to, victims and their impact statements at sentencing. It identifies a range of approaches that judges take to acknowledge victims in their remarks, and uses a series of examples to explore therapeutic judicial practice from a victim-focused perspective. It then makes recommendations for a number of educative processes that will assist judges to develop an understanding of how best to effectively and therapeutically acknowledge victims, while still balancing the other requirements of sentencing.

Chapter 6 is the second findings Chapter. It explores the interviews undertaken with both victims and justice professionals in relation to impact statements and sentencing processes across the research jurisdictions. The Chapter focuses on a significant problem identified from the interviews and the literature review, namely a pervasive lack of understanding of the purpose and use of victim impact statements in sentencing. In order to resolve this uncertainty, the Chapter

recommends a model that will, if adopted, achieve consistency and clarity in victim impact statement regimes across the Australian research jurisdictions.

Chapter 7 is the final findings Chapter. It examines common problems raised by victims around the lack of information they received throughout their justice process experience, including a lack of information about sentencing. The Chapter identifies a number of issues within current victims' rights regimes that may prevent effective information sharing between justice professionals and victims. It then explores evidence-based literature on effective communication skills to propose a number of strategies for improving communication between professionals and victims of crime.

Chapter 8 is the conclusion. It summarises the findings of the thesis, and consolidates the recommendations made throughout. Chapter 8 highlights the importance of these recommendations, and recapitulates their implications for improved policy and practice for judicial officers and justice professionals who work with victims throughout the sentencing process. These recommendations are of significance not only to the research jurisdictions examined within the thesis, but also to other jurisdictions with impact statement regimes, both in Australia and internationally.

CHAPTER 2:

VICTIM PARTICIPATION IN SENTENCING: A REVIEW OF THE LITERATURE

I	Introduction	15
II	The Historic Role of the Victim.....	16
III	Victims' Needs and the Development of Victims' Rights	18
IV	Victim Impact Statements and the Modern Role of the Victim	20
V	What Are the Possible Purposes of Victim Impact Statements?.....	22
VI	Victim Impact Statements: Previous Empirical Research	25
	<i>A Objections on Procedural Grounds</i>	25
	1 <i>Do Victim Impact Statements Unfairly Increase Sentences?</i>	25
	2 <i>Do Victim Impact Statements Cause Court Delays?</i>	27
	<i>B Objections Based on Concerns about the Content of Victim Impact Statements</i>	27
	1 <i>Are Victim Impact Statements Superfluous?</i>	27
	2 <i>What if Victim Impact Statements Contain Contradictory or Inflammatory Material?</i>	30
	<i>C Objections Based on Concerns for Victims</i>	31
	1 <i>Can the Use of Victim Impact Statements Re-traumatise Victims?</i>	31
	2 <i>Are Victims Disappointed if their Impact Statement Fails to Influence the Sentence Imposed on the Offender?</i>	32
VII	Why Do Victims Submit Impact Statements?	34
VIII	How Do Victims Feel after Submitting their Impact Statement?	35
IX	Victim Impact Statements and Victims of Sexual Offending	39
X	Judicial Acknowledgment of Victim Impact Statements	41
XI	Conclusion and Summary of Research Gaps.....	44

I INTRODUCTION

The study of victims' needs and the establishment of victims' rights are fairly recent developments. This Chapter touches briefly on the evolution of these rights, before exploring one in particular: victims' right to participate in sentencing by submitting a victim impact statement. Despite this process now

being an accepted part of the modern criminal justice system,⁵⁹ research into the use of impact statements by victims of sexual offending is lacking, as is research into the practical use of those statements by judicial officers in court. This Chapter establishes the current state of the literature on these issues, framed by a particular focus on the two principal, and largely conflicting, approaches to the purpose of victim impact statements. The Chapter then identifies the knowledge gaps that this thesis begins to fill.

II THE HISTORIC ROLE OF THE VICTIM

The role of the victim in the criminal justice system has changed dramatically over time. In the past, at least until the end of the 11th century, victims were active participants in the criminal process because crimes were considered to be tortious, or private, in nature.⁶⁰ This meant that it was the victim and his or her family or community who undertook action to rectify any injury suffered. According to Sankoff and Wansborough, this type of system had significant drawbacks for the community as a whole, because it allowed victims or their families to ‘take laws into their own hands ... [which] was liable to result in larger vendettas or blood feuds between clans or families.’⁶¹

In addition to negative effects on the community, victim-based retribution was perceived to have another disadvantage. The model was seen by the monarchy as obstructive to its ability to rule effectively and was considered a breach of the

⁵⁹ As Michael O’Connell points out in O’Connell, above n 31, the issue of whether victims should have a voice in court would have provoked strong emotions two decades ago, while now ‘the question is more likely to be: should victims have a stronger voice in court?’

⁶⁰ Lucia Zedner, *Criminal Justice* (Oxford University Press, 2004) 8; Tony Kearon and Barry S Godfrey, ‘Setting the Scene: A Question of History’ in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Willan Publishing, 2007) 17, 20; Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing* (Hart Publishing, 3rd ed, 2009) 163.

⁶¹ Peter Sankoff and Lisa Wansborough, ‘Is Three Really a Crowd? Thoughts about Victim Impact Statements and New Zealand’s Revamped Sentencing Regime’ (Paper presented at the International Conference of the International Society for the Reform of Criminal Law, Brisbane, July 2006) 6.

King's peace.⁶² Consequently, the King chose to take a more active role in the prosecution of defendants, by converting criminal injury into a public wrong. Thus began the decline of the victim's role in the criminal justice system.⁶³ By the 14th century, prosecution had become entirely the domain of the Crown.⁶⁴

This progression from a system of 'private vengeance to state administered justice'⁶⁵ resulted in a criminal justice system where, for hundreds of years, the victim's role was limited to that of witness. This meant that the victim had no power to compel prosecution or influence the sentence imposed on the offender, nor any standing to contest decisions.⁶⁶ Christie described this as the theft of the conflict from the victim, arguing that the victim is a 'heavy loser in this situation. Not only has he suffered, lost materially or become hurt, physically or otherwise ... above all he has lost participation in his own case.'⁶⁷

In more modern times, beginning in the 20th century, the victim's lack of formal role in the criminal justice process led to a larger societal perception of injustice.⁶⁸ As Duff points out, 'it is hard to explain the sense in which [crimes] are "public" wrongs without denigrating the victim's standing by implying that they are wrongs against "the public" rather than the victim.'⁶⁹ It became generally understood that, at best, the criminal justice system left victims feeling

⁶² Aldo Raineri, 'Re-integrating the Victim into the Sentencing Process' (1995) 11 *Queensland University of Technology Law Journal* 79, 80; Alan N Young, 'The Role of the Victim in the Criminal Process: a Literature Review - 1989 to 1999' (Victims of Crime Research Series, Department of Justice, Canada, August 2001) 6.

⁶³ Young, above n 62, 6; Kearon and Godfrey, above n 60, 17, 21.

⁶⁴ Kearon and Godfrey, above n 60, 17, 21; Young, above n 62.

⁶⁵ Erez, Roeger and Morgan, above n 24, 1.

⁶⁶ Ibid.

⁶⁷ Nils Christie, 'Conflicts as Property' (1977) 17(1) *British Journal of Criminology* 1, 7. See also Lucia Zedner, 'Reparation and Retribution: Are They Reconcilable?' (1994) 57 *Modern Law Review* 228, 231.

⁶⁸ Erez, Roeger and Morgan, above n 24.

⁶⁹ RA Duff, 'Restoration and Retribution' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing* (Hart Publishing, 3rd ed, 2009) 180. See also Carolyn Hoyle, 'Victims, the Criminal Process, and Restorative Justice' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (Oxford University Press, 5th ed, 2012) 414.

aggrieved; at worst, it caused victims to feel disempowered, disenchanting and alienated,⁷⁰ which could result in their re-victimisation.⁷¹

III VICTIMS' NEEDS AND THE DEVELOPMENT OF VICTIMS' RIGHTS

Beginning in the 1970s, the victims' rights movement emerged, drawing particular attention to the 'unenviable and essentially powerless position of victims of sexual crimes.'⁷² The movement advocated for the needs of victims that were largely ignored by the justice system, including the need for emotional support and information, and the need to be heard, compensated and acknowledged.⁷³ The movement successfully exerted pressure on governments across Australia and other jurisdictions to develop support services to address these needs.

In the 1980s, the goals of the movement shifted toward establishing formal rights for victims within the criminal justice system.⁷⁴ Legislatures in some Australian jurisdictions responded quickly. For example, in 1981, South Australia established a Committee of Inquiry into Victims of Crime.⁷⁵ This trend was also taking place overseas, and in 1982, the United States President's Task Force on Victims of Crime proclaimed that:

Victims, no less than defendants, are entitled to their day in court. Victims, no less than defendants, are entitled to have their views considered. A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the

⁷⁰ Karen Katz, 'Opposing Scales of Justice: Victims' Voices in the Sentencing Process' (2010) 14 *Canadian Criminal Law Review* 181, 184.

⁷¹ Andrew Ashworth, 'Victim Impact Statements and Sentencing' (1993) *Criminal Law Review* 498, 499; Elaine Mossman, 'Victims of Crime in the Adult Criminal Justice System: A Stocktake of the Literature' (United Kingdom Ministry of Justice, October 2012) 17.

⁷² O'Connell, above n 15, 243.

⁷³ Hoyle and Zedner, above n 7, 471; Annemarie ten Boom and Karlijn F Kuijpers, 'Victims' Needs as Basic Human Needs' (2012) 18(2) *International Review of Victimology* 155.

⁷⁴ O'Connell, above n 15; Amanda Konradi and Tina Burger, 'Having the Last Word An Examination of Rape Survivors' Participation in Sentencing' (2000) 6(4) *Violence Against Women* 351.

⁷⁵ O'Connell, above n 31.

crime has burdened the victim. A judge cannot reach an informed determination of the danger posed by the defendant without hearing from the person he has victimized.⁷⁶

By 1985, the United Nations General Assembly had resolved to 'adopt and implement the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'⁷⁷ (The Declaration). The Declaration recognised victims' need to:

- Be treated with compassion and respect,
- Be informed of their role within the justice system, the progress of the proceedings, and of the disposition of their cases, and
- Have their views presented and considered at appropriate stages of the proceedings.⁷⁸

It also urged the implementation of victims' rights legislation, proposing 'minimum standards for the treatment of victims, including to be treated fairly, to obtain compensation, and [to] be provided with assistance in healing and recovery.'⁷⁹

Since that time, victims' rights instruments have been introduced in Australia and a number of other jurisdictions worldwide.⁸⁰ The Australian instruments reflect many of the United Nations Basic Principles of Justice for Victims of Crime, such as victims' right to receive information about their case. Some provide guidance to assist state institutions to treat victims in a sympathetic and dignified way, and to protect victims' privacy. Many also provide the right for

⁷⁶ President's Task Force on Victims of Crime, *President's Task Force on Victims of Crime Final Report* (Department of Justice, 1982) 76-77.

⁷⁷ Mossman, above n 71, 3.

⁷⁸ *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/RES/40/34 UN GAOR, 96th plenary meeting (29 November 1985).

⁷⁹ Mossman, above n 71, 3.

⁸⁰ In Australia, these instruments are the: *Victims of Crime Act 1994* (ACT); *Victims' Rights and Support Act 2013* (NSW); Northern Territory Charter of Victims' Rights; *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); Tasmanian Charter of Victims' Rights; *Victims' Charter Act 2006* (Vic); *Victims of Crime Act 1994* (WA).

information about the harm caused to the victim to be presented to the sentencing court through a victim impact statement.⁸¹

IV VICTIM IMPACT STATEMENTS AND THE MODERN ROLE OF THE VICTIM

Victim impact statements are reports provided to the court before the offender is sentenced. They outline the effect of the offending on the victim, including details such as the physical, psychological and financial suffering that the victim has experienced as a consequence of the offending. They are currently used in Australia, Canada, New Zealand, the United Kingdom and the US.⁸² While they were introduced as early as the 1980s in some US, Australian and Canadian jurisdictions,⁸³ they were not legislated for in England and Wales until 2001 and in Scotland until 2003.⁸⁴

⁸¹ *Victims' Rights and Support Act 2013* (NSW) s 6; *Victims of Crime Assistance Act 2009* (Qld) s 15; *Victims of Crime Act 2001* (SA) s 10; *Victims' Charter Act 2006* (Vic) s 13. Where this right is not provided for by Australian victims' rights instruments, it is instead granted by the relevant sentencing legislation: *Crimes (Sentencing) Act 2005* (ACT) ss 47-53; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26-30; *Sentencing Act 1995* (NT) ss 106A-106B; *Victims of Crime Assistance Act 2009* (Qld) ss 15-15A; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Sentencing Act 1997* (Tas) s 81A; *Sentencing Act 1991* (Vic) s 8K-8S; *Sentencing Act 1995* (WA) s 25.

⁸² Sam Garkawe, 'The Effect of Victim Impact Statements on Sentencing Decisions' (Paper presented at the Sentencing Principles, Perspectives and Possibilities Conference, Canberra, February 2006) 1.

⁸³ Impact statements have been used since 1989 in South Australia: Erez, Roeger and Morgan, above n 24; since 1993 in the ACT, and since 1994 in Victoria: Martin Hinton, 'Expectations Dashed: Victim Impact Statements and the Common Law Approach to Sentencing in South Australia' (1995) 14(1) *University of Tasmania Law Review* 81, 82; since 1994 in Western Australia under the now partially superseded *Victims of Crime Act 1994* (WA); since 1996 in NSW: Tyrone Kirchengast, 'Recent Developments in Victim Agency in the New South Wales Justice System: The Case of Victim Impact Statements' (2006) 13 *James Cook University Law Review* 125; since 1996 in Queensland: Mark Thomas, 'They Do Things Differently There: Issues Arising From the Queensland Experience of Victim Impact Statements' (Paper presented at the Restoration for Victims of Crime Conference, Melbourne, September 1999); and since 1997 in Tasmania: Tasmania, *Parliamentary Debates*, House of Assembly, 30 September 1997.

⁸⁴ James Chalmers, Peter Duff and Fiona Leverick, 'Victim Impact Statements: Can Work, Do Work (For Those Who Bother to Make Them)' (2007) (May) *Criminal Law Review* 360; Sam Garkawe, 'Victim Impact Statements and Sentencing' (2007) 33 *Monash University Law Review* 90, 92.

The introduction of impact statements at sentencing reflects the modern conception of the victim within the criminal justice system, wherein their role is no longer limited to that of simply witness for the prosecution.⁸⁵ This shift arose from a 'genuine and deeply rooted realisation that victims have a legitimate interest in the way that criminal justice is administered, in terms of substance, processes and outcomes.'⁸⁶ The recognition of the interests of victims alongside the rights and interests of the defendant and the community has been described as a 'triangulation of interests.'⁸⁷

The recognition of the interests of the victim cannot, however, override the defendant's right to a fair trial, which is 'a central pillar' of the criminal justice system.⁸⁸ This right 'extends to the whole course of the criminal process,'⁸⁹ including sentencing. As a result of the requirement to both adhere to fundamental criminal justice principles for the offender, and promote the interests of the victim, impact statement schemes have been described as an 'attempt to balance interests that are not easily balanced,'⁹⁰ which has steered the criminal justice system into 'unfamiliar territory where the ideological lines are far from clear.'⁹¹

Consequently, the introduction of victim impact statements at sentencing has not been without detractors, who have argued against them because of the possibility that they may conflict with the 'central pillar' of the defendant's right to a fair trial.⁹² However, the issue of fairness to the defendant arises only if

⁸⁵ Victorian Law Reform Commission, above n 28, 22.

⁸⁶ Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 243. See also *Jago v District Court of New South Wales* (1989) 168 CLR 23, 54 (Brennan J).

⁸⁷ Jeremy Badgery-Parker, 'The Criminal Process in Transition: Balancing Principle and Pragmatism' (1995) 4 *Journal of Judicial Administration* 171, 172.

⁸⁸ *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

⁸⁹ *X7 v Australian Crime Commission* (2013) 248 CLR 92, 116 (French CJ and Crennan J).

⁹⁰ *R v FD* [2006] NSWCCA 31 [97] (Sully J).

⁹¹ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 4.

⁹² See Hoyle, above n 69, 412; Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2015) 162; Sam Garkawe,

judicial officers rely on the information in victim impact statements when determining the offender's sentence. It is therefore critical to determine the purpose for which victim impact statements are intended to be used.

V WHAT ARE THE POSSIBLE PURPOSES OF VICTIM IMPACT STATEMENTS?

Roberts has explained that the goals of victim impact statements are primarily: to increase victim and societal satisfaction with the criminal justice system; to increase offenders' awareness of the harms that they have caused; to promote healing and closure for victims; and to apprise sentencing judges of the harms suffered by victims, which could be taken into account in determining sentences.⁹³ These goals reveal the two potential underlying purposes of impact statements, namely:

1. As instrumental tools, used by the judge in determining sentencing, whereby the impact statement can influence the sentence imposed; or
2. As communicative or expressive tools, which allow victims to achieve healing and catharsis by sharing with the court, the offender, and the public, the harm caused to them by the offending.⁹⁴

There is a fundamental divergence between these two approaches, which Manikis has described as a 'conflict.'⁹⁵

'The Role of the Victim During Criminal Court Proceedings' (1994) *University of New South Wales Law Journal* 595; Edna Erez, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' (1999) *Criminal Law Review* 545, 547; Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice* (Routledge, 2000) 199; Andrew Sanders et al, 'Victim Impact Statements: Don't Work, Can't Work' (2001) *Criminal Law Review* 447; Ian Edwards, 'The Place of Victims' Preferences in the Sentencing of "Their" Offenders' (2002) *Criminal Law Review* 689; Julian V Roberts and Marie Manikis, *Victim Personal Statements: A Review of Empirical Research* (Report for the Commissioner for Victims and Witnesses in England and Wales, October 2011) 6.

⁹³ Julian V Roberts, 'Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings' (2003) 47 *Criminal Law Quarterly* 365, 372.

⁹⁴ Julian V Roberts and Edna Erez, 'Communication at Sentencing: The Expressive Function of Victim Impact Statements' in Anthony Bottoms and Julian V Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Willan, 2010).

⁹⁵ Marie Manikis, 'Victim Impact Statements at Sentencing: Towards a Clearer Understanding of their Aims' (2015) 65 *University of Toronto Law Journal* 85.

An instrumental approach views impact statements as a tool for the judicial officer to assess the actual harm caused by the offending, and, by taking that harm into account, to determine the sentence to be imposed. This information about harm could enhance the retributive aims of sentencing,⁹⁶ and assist the judicial officer in determining aggravating factors at sentencing. If victim impact statements are used instrumentally, the fundamental principle of the offender's right to a fair trial requires that impact statements be treated as evidence, and comply with rules relating to evidence and proof. This is because, as noted by the majority of the High Court in *R v Olbrich*, 'the process by which a court arrives at the sentence to be imposed on an offender has just as much significance for the offender as the process by which guilt or innocence is determined.'⁹⁷ Consequently, if used instrumentally, the content of impact statements must be limited to information that meets the standard of proof in the event of a challenge from the defence, and offenders must have the opportunity to challenge that information, for example through objection and submissions from the bar table,⁹⁸ or through cross-examination of the victim.⁹⁹

In contrast, under an expressive approach to victim impact statements, Manikis has explained that:

A [victim impact statement] understood solely as having an expressive function is not intended to affect the nature or quantum of the sentence ... since its role is not to adduce evidence but rather to express emotion, there is no real need to ensure the factual reliability or the relevance of the information ... Typically, this will allow more flexibility in terms of the content of the statement as well as in what methods of delivering the statement are permissible.¹⁰⁰

⁹⁶ See Tracey Booth, 'Restoring Victims' Voices: Victim Impact Statements in the Sentencing Process' (2005) (86) *Reform* 59.

⁹⁷ *R v Olbrich* (1999) 199 CLR 270 [1] (Gleeson CJ, Gaudron, Hayne and Callinan JJ).

⁹⁸ See Tracey Booth, 'Crime Victims and Sentencing: Reflections on "Borthwick"' (2011) 36(4) *Alternative Law Journal* 236.

⁹⁹ Ian Edwards, 'The Evidential Quality of Victim Personal Statements and Family Impact Statements' (2009) 13(4) *International Journal of Evidence and Proof* 293, 299.

¹⁰⁰ Manikis, above n 95, 92.

In essence, when viewed expressively, an impact statement has no effect on the sentence imposed on the offender. Instead, it is seen only as a therapeutic tool, which should ideally assist the victim by providing a cathartic experience. Accordingly, an expressive impact statement scheme would allow victims to share whatever information they choose, without being constrained by rules of evidence and proof, or fear of the content being questioned via cross-examination.

The expressive purpose may appear at first glance to be the more therapeutic approach from a victim-focused perspective, since it seems to align more closely with the originating aims of impact statement schemes, namely to increase victims' involvement in, and improve victims' experience of, the justice process. However, if impact statements are used expressively, and victims are permitted the freedom to include any information they choose within their statement without that information being verified via cross-examination, then it follows that judicial officers must ignore impact statements in determining sentence, and must make it clear that they have done so. If this is not done, there is a danger that sentences may appear to be tainted by possibly irrelevant material from impact statements. Yet, as will be discussed in Section X below, recent research reveals that victims derive great therapeutic benefit from judicial acknowledgment of their impact statements at sentencing. Consequently, if judicial officers cannot acknowledge impact statements when sentencing, then an expressive approach may also be anti-therapeutic from a victim-focused perspective.

The divergence between these two approaches, and the consequential outcomes for victims and offenders, raises questions of whether one purpose should be preferred, or whether elements of both can be implemented in impact statement regimes. This is an important question because the rules and requirements of any impact statement regime must be informed by the purpose of such statements.¹⁰¹ One would therefore expect that victim impact statement

¹⁰¹ See Teagan Markin, 'Victim Rights in Sentencing: An Examination of Victim Impact Statements' (2017) 22(1) *Canadian Criminal Law Review* 95, 102.

legislation would contain clear direction in this regard. Yet as will be discussed in Chapter 3, there is no explicit indication as to which of these purposes actually underlies impact statement regimes in Australia, and implied indicators of purpose are confused and sometimes contradictory.¹⁰² This lack of clarity frames much of the analysis and discussion throughout the remainder of the thesis. Ultimately, Chapter 6 will argue that it is possible for a properly constructed and principled victim impact statement regime to balance instrumental and expressive approaches in order to prioritise a victim focus, without jeopardising fairness to the offender.

VI VICTIM IMPACT STATEMENTS: PREVIOUS EMPIRICAL RESEARCH

In addition to the unresolved question of the purpose of victim impact statements, there have also been a number of practical objections arising from the implementation of impact statement schemes. These objections are based on fears that:

- The use of impact statements may unfairly increase sentences for offenders;
- Impact statement may cause court delays;
- Impact statements may be superfluous;
- Impact statements may contain inflammatory information, or contain information contradictory to that which is already before the court;
- Victims may be re-traumatised by the process of submitting an impact statement; and
- Victims may expect their impact statement to influence the sentence imposed on the offender. This may raise expectations that are then disappointed.

Many of these objections can be and have been subject to empirical research.

A Objections on Procedural Grounds

1 Do Victim Impact Statements Unfairly Increase Sentences?

As touched upon in Section IV above, Edwards has argued that the ‘central theoretical constraint’ on the use of victim impact statements at sentencing is the

¹⁰² See also Booth, above n 92, 36.

risk of interfering with procedural fairness for the offender.¹⁰³ In particular, a common argument against impact statements is that they may result in victim-driven sentencing.¹⁰⁴ Concerns have been expressed that impact statements could lead to ‘punishment based in part on consequences arising from characteristics of the victim, rather than on the actions and intentions of the offender.’¹⁰⁵ For example, Hörnle has argued that such statements could lead to ‘a subjective approach [that] lets emotions shape legal decisions.’¹⁰⁶ On that issue, a question often asked in the literature is whether an offender who kills a victim who does not have a family should be punished less severely than one who kills a victim who is well-loved.¹⁰⁷ In cases where the primary victim is still alive, critics have expressed concern that similar cases might be treated differently, depending on factors such as the resilience and vindictiveness or forgiveness of the victim.¹⁰⁸ It has also been argued that impact statements could increase the unpredictability of sentencing, which should ideally demonstrate consistency in the punishment of offenders.¹⁰⁹

However, studies undertaken by many researchers including Muir,¹¹⁰ Roberts and Manikis,¹¹¹ Erez and Tontodonato,¹¹² and Erez, Roeger and Morgan,¹¹³ indicate that victim impact statements have not led to victim-driven sentencing.

¹⁰³ Edwards, above n 99, 299.

¹⁰⁴ Ashworth, above n 71, 507.

¹⁰⁵ Adelma M Hills and Donald M Thomson, ‘Should Victim Impact Influence Sentences? Understanding the Community's Justice Reasoning’ (1999) 17(5) *Behavioral Sciences and The Law* 661, 661.

¹⁰⁶ Tatjana Hörnle, ‘Distribution of Punishment: The Role of a Victim's Perspective’ (1999) 3(1) *Buffalo Criminal Law Review* 175, 176.

¹⁰⁷ Julian V Roberts and Marie Manikis, ‘Victim Impact Statements at Sentencing: Exploring the Relevance of Ancillary Harm’ (2010) 15(1) *Canadian Criminal Law Review* 1, 7.

¹⁰⁸ Ashworth, above n 71, 506; Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed, 2015) 442.

¹⁰⁹ Garkawe, above n 84, 94.

¹¹⁰ Outlined in Roberts, above n 93.

¹¹¹ Marie Manikis and Julian V Roberts, ‘Recognizing Ancillary Harm at Sentencing: A Proportionate and Balanced Response’ (2011) 15(2) *Canadian Criminal Law Review* 131.

¹¹² Erez and Tontodonato, above n 25, 451-452.

¹¹³ Erez, Roeger and Morgan, above n 24.

Erez and Tontodonato found that specific requests for incarceration by the victim did not influence courts' choice of sentence.¹¹⁴ Other studies found that impact statements affect neither the type of sanction imposed on the offender, nor the length of punishment.¹¹⁵ It is now commonly accepted that victim impact statements generally have no effect on sentencing severity.¹¹⁶ Consequently, the literature suggests that critics' fears that impact statements would lead to victim-driven sentencing have not been realised.

2 Do Victim Impact Statements Cause Court Delays?

Another early fear expressed about the use of victim impact statements was that victim participation in sentencing could lead to court delays and longer trials.¹¹⁷ However, this fear has been allayed by Erez, Roeger and Morgan's research in South Australia, which found that the use of impact statements does not lead to court delays or increased expense.¹¹⁸ In addition, O'Connell's surveys of judicial officers in South Australia found that not one believed that the statements significantly delayed the sentencing process — only that there could be a slight increase in time spent on sentencing, since victims have the right to read their statements, or have them read out.¹¹⁹

B Objections Based on Concerns about the Content of Victim Impact Statements

1 Are Victim Impact Statements Superfluous?

According to Garkawe, some opponents of victim impact statements have argued that they are 'superfluous ... because the very nature and circumstances of the crime [are] enough to assess the relevant seriousness of the crime and its likely

¹¹⁴ Erez and Tontodonato, above n 25, 467.

¹¹⁵ Erez and Tontodonato, above n 25; Davis and Smith, above n 25; Robert C Davis and Barbara E Smith, 'Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?' (1994) 22(1) *Journal of Criminal Justice* 1.

¹¹⁶ Edna Erez and Linda Rogers, 'Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals' (1999) 39(2) *British Journal of Criminology* 216, 216.

¹¹⁷ O'Connell, above n 31, 5.

¹¹⁸ Erez, Roeger and Morgan, above n 24, 40.

¹¹⁹ O'Connell, above n 31, 5.

effect on the victims.’¹²⁰ Similarly, Sanders et al asserted that the reason that victim impact statements do not affect sentence length is because, in most cases, the effect of a crime upon a victim is the effect that one would expect, given the nature and seriousness of the crime committed. They have argued, therefore, that ‘if a VIS says nothing unexpected, it inevitably makes no difference.’¹²¹

However, there is a connection between the information about harm detailed by victim impact statements and the purposes of punishment in Australia, such as protection of the community,¹²² denunciation,¹²³ rehabilitation,¹²⁴ ‘just’ or ‘adequate’ punishment,¹²⁵ and recognition of the victim.¹²⁶ Under current sentencing regimes, this information may be used to assist judicial officers in a number of ways. For example, information regarding victim harm can assist with protection of the community by establishing whether the offender poses such a risk to the community that a term, or longer term, of imprisonment is warranted.¹²⁷ The information may assist the judicial officer to denounce the

¹²⁰ Garkawe, above n 82, 2.

¹²¹ Sanders et al, above n 92, 454.

¹²² *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(c); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(c); *Sentencing Act 1995* (NT) s 5(1)(e); *Penalties and Sentences Act 1992* (Qld) s 9(1)(e); *Criminal Law (Sentencing) Act 1988* (SA) s 10(2)(a); *Sentencing Act 1997* (Tas) s 3(b); *Sentencing Act 1991* (Vic) s 5(1)(e); *Sentencing Act 1995* (WA) s 6(4)(b).

¹²³ *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(f); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(f); *Sentencing Act 1995* (NT) s 5(1)(d); *Penalties and Sentences Act 1992* (Qld) s 9(1)(d); *Sentencing Act 1997* (Tas) s 3(e)(iii); *Sentencing Act 1991* (Vic) s 5(1)(d).

¹²⁴ *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(d); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(d); *Sentencing Act 1995* (NT) s 5(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(b); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(m); *Sentencing Act 1997* (Tas) s 3(e)(ii); *Sentencing Act 1991* (Vic) s 5(1)(c).

¹²⁵ *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a); *Sentencing Act 1995* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j); *Sentencing Act 1991* (Vic) s 5(1)(a); *Sentencing Act 1995* (WA) s 6(4)(a).

¹²⁶ *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(8); *Criminal Law (Sentencing) Act 1988* (SA) ss 10(1)(d)-(e); *Sentencing Act 1997* (Tas) s 3(h).

¹²⁷ Andrew von Hirsch and Lila Kazemian, ‘Predictive Sentencing and Selective Incapacitation’ in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing* (Hart Publishing, 3rd ed, 2009); Victorian Sentencing Advisory

offender's conduct by publicly identifying the harmful effects that the offending has caused. The information contained in impact statements may also provide an opportunity for the offender to comprehend fully the harm that they have caused to the victim. This may assist offenders to rehabilitate, by changing their views about crime, or their future choices in relation to offending behaviour.¹²⁸ Judicial determination of 'just' or 'adequate' punishment, which is measured by the culpability of the offender and the seriousness of the harm caused by the offending, may also be assisted by the description of harm contained in an impact statement.¹²⁹ Finally, recognition of the victim may be achieved through judicial acknowledgment of the victim and their impact statement when sentencing. Therefore, the information contained in an impact statement is relevant to a number of purposes of punishment, and cannot be seen as superfluous when understood in this context.

Furthermore, Erez found in her research with judicial officers that while some were of the view that impact statements are sometimes redundant, or that the harm caused to the victim could be inferred from the evidence on file, there were cases in which the statement contained new information. This was found to be helpful to judicial officers, as it prompted them to reconsider the penalty that they had intended to impose, and to impose instead 'a more commensurate

Council, 'How much Does Imprisonment Protect the Community through Incapacitation?' (July 2012).

¹²⁸ Trey Hill, 'Victim Impact Statements: A Modified Perspective' (2005) 29 *Law and Psychology Review* 211; Rob White and Santina Perrone, *Crime, Criminality and Criminal Justice* (Oxford University Press, 1st ed, 2010) 119; Joanna Shapland and Matthew Hall, 'Victims at Court: Necessary Accessories or Principal Players at Centre Stage?' in Anthony Bottoms and Julian Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Routledge, 2010).

¹²⁹ Booth, above n 92, 40; Susan Ann Cornille, 'Retribution's 'Harm' Component and the Victim Impact Statement: Finding a Workable Model' (1993) 18 *University of Dayton Law Review* 389; Edna Erez 'Integrating a Victim Perspective through Victim Impact Statements' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice* (Routledge, 2000) 167; Michael Flatman and Mirko Bagaric, 'The Victim and the Prosecutor: The Relevance of Victims in Prosecution Decision Making' (2001) 6(2) *Deakin Law Review* 238; Tyrone Kirchengast, 'Proportionality in Sentencing and the Restorative Justice Paradigm: 'Just Deserts' for Victims and Defendants Alike?' (2009) 4(2) *Criminal Law and Philosophy* 197.

sentence.’¹³⁰ O’Connell also found that most South Australian judicial officers felt that impact statements contained useful information that would otherwise be unavailable to them.¹³¹ In fact, one judicial officer interviewed by O’Connell said, ‘I can’t conceive being able to sentence properly and take proper account of the effect of the crime without [a victim impact statement].’¹³² The Winnipeg Department of Justice also found that impact statements contained substantially more detail relating to the harm suffered by the victim than was otherwise available, and that the information provided in the statements was not necessarily available to the court from other sources.¹³³ Accordingly, this body of research indicates that impact statements are not considered superfluous by the judicial officers who receive them.

Moreover, any criticism of superfluosity disregards the utility that statements may have when not being used for instrumental purposes. As explored elsewhere in this Chapter, the usefulness of impact statements extends beyond their assistance to sentencers; in addition, they may provide significant benefits to victims when used expressively.

2 What if Victim Impact Statements Contain Contradictory or Inflammatory Material?

Chalmers, Duff and Leverick have considered the issue of how the court should respond when a victim impact statement contains information that is contradictory to other evidence before the court.¹³⁴ This may arise particularly where an offender is convicted of only one or some of the offences for which they were charged. Chalmers, Duff and Leverick have argued, however, that this is not a matter of concern because it is the judicial officer’s role to disregard non-

¹³⁰ Erez, above n 92, 548. Interestingly, in this ‘minority of cases in which VIS made a difference’ it was found that the effect of the impact statement was just as likely to lead to a more lenient sentence as it was a harsher sentence than the judicial officer had planned.

¹³¹ O’Connell, above n 31, 6.

¹³² Ibid 3.

¹³³ R S Sloan Associates, *Victim Impact Statements in Canada* (Department of Justice Canada, 1990), quoted in Roberts, above n 93, 390.

¹³⁴ Chalmers, Duff and Leverick, above n 84, 364.

probative or prejudicial material in any hearing, whether a sentencing hearing or otherwise. Accordingly, contradictory information will be disregarded by the judicial officer, therefore causing no unfairness to the offender.¹³⁵

This argument applies equally to fears that impact statements might contain inflammatory or prejudicial material; again, it is a judicial officer's role to disregard non-probative unfairly prejudicial material. Notably, Erez, Roeger and Morgan found in their qualitative research undertaken with judicial officers that impact statements 'rarely include inflammatory, prejudicial or other objectionable statements. Similarly, exaggerations are not common place.'¹³⁶

C Objections Based on Concerns for Victims

1 Can the Use of Victim Impact Statements Re-traumatise Victims?

In the past, it was feared that victims may be re-traumatised by the process of submitting a victim impact statement due to the risk of cross-examination on their content.¹³⁷ Being subject to cross-examination could arguably interfere with the therapeutic benefits that may otherwise be obtained from the impact statement process. Yet Australian research indicates that this concern is overstated. In South Australia, O'Connell showed that only two judicial officers could identify a case where victims had been cross-examined on their impact statements.¹³⁸ The Victorian Victim Support Agency's research also found that 98 per cent of judicial officers said that cross-examination of victims on their impact statements almost never or never happened.¹³⁹ Therefore, the potential for a victim to be re-traumatised by cross-examination on their impact statement does not appear to be a significant risk, at least in Australia.¹⁴⁰

¹³⁵ Ibid. See, for example, Refshauge J in *Welch v R* [2011] ACTCA 19 [70], who explained that 'judges are expected to be able to set aside material they have viewed which must be ignored because irrelevant or inadmissible.'

¹³⁶ Erez, Roeger and Morgan, above n 24, 40.

¹³⁷ O'Connell, above n 31, 5.

¹³⁸ Ibid.

¹³⁹ Victorian Victim Support Agency, above n 31, 12.

¹⁴⁰ In her NSW research, Booth explored the separate yet related issue of the potential for victim re-traumatisation as a consequence of insensitive objections and/or

2 Are Victims Disappointed if their Impact Statement Fails to Influence the Sentence Imposed on the Offender?

As noted in Section V above, a significant problem is the pervasive confusion about the exact purpose for which impact statements are intended. According to Roberts, some victims are under the impression that completing an impact statement will lead to the offender being penalised by a harsher sentence.¹⁴¹ This idea is supported by Hoyle et al, who found that while 60 per cent of victims in England and Wales submitted their impact statements for expressive purposes, half also did so for instrumental reasons, ie to influence the sentence imposed on the offender.¹⁴² Due to this confusion, some authors such as Edwards have argued that impact statement schemes should not exist at all.¹⁴³ Research has certainly shown that a lack of understanding or incorrect beliefs about impact statement schemes can have negative effects on the victims involved. For example, the South Australian Legislative Review Committee's Report on Victim Impact Statements found that victims could become angry and confused when not made fully aware of how their statements might be used.¹⁴⁴

Roberts went so far as to say that there was a 'near-universal issue' in the gap between victim expectation and the actual use of impact statements in sentencing.¹⁴⁵ This result is not surprising, given the noted lack of legislative

submissions on the content of impact statements by defence from the bar table, or insensitive treatment of victims by judicial officers in response to the objections or submissions by defence: see Booth, above n 98. Booth's research identified the significant problems that arose from this type of insensitive treatment in what she described as the particularly 'remarkable' case of *R v Borthwick* [2010] VSC 613. However, because this research concerned only one case, and did not contain a systematic review of other similar occurrences, it is difficult to draw conclusions as to the prevalence of this type of judicial or defence behaviour, and consequently difficult to quantify the risk of victim re-traumatisation that may occur because of it.

¹⁴¹ Julian V Roberts, 'Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole' (2009) 38(1) *Crime and Justice* 347, 371.

¹⁴² Hoyle et al, above n 26, 26.

¹⁴³ Edwards, above n 99, 295. See also Ashworth (2015), above n 108, 442-443.

¹⁴⁴ Parliament of South Australia, Legislative Review Committee, *Report of the Legislative Review Committee into Victim Impact Statements* (2010) 36.

¹⁴⁵ Roberts, above n 93, 386; see also Andrew Ashworth, *The Criminal Process: An Evaluative Study* (Oxford University Press, 2nd ed, 1998) 36.

clarity surrounding the purpose of impact statements. However, other research suggests that confusion about the purpose of submitting an impact statement can be overcome by sufficient victim education. This was shown by Leverick, Chalmers and Duff, who evaluated the pilot project which introduced the use of victim impact statements in Scotland.¹⁴⁶ As part of this scheme, which commenced in 2003, victims were provided with a letter and leaflet explaining the impact statement scheme.¹⁴⁷ Ninety per cent of participants reported reading all or most of the letter and the leaflet.¹⁴⁸ In contrast to the results of earlier research, Leverick, Chalmers and Duff found that only five per cent of victims in their study submitted impact statements with the intention of influencing the sentence.¹⁴⁹ This indicates that victims' understanding of the nature of victim impact statements is greatly improved by education about the role of the statement in sentencing. Similarly, Erez has argued that the problem of victims' confusion or unmet expectations 'can be resolved by explaining to victims that the VIS is only one of the factors judges use to determine the type and severity of penalties.'¹⁵⁰ This view is also shared by the South Australian Legislative Committee, which made a recommendation that issues of victim confusion about court processes could be addressed by improving communication between the courts and victims.¹⁵¹

To date, no empirical research has been undertaken specifically to examine improved victim education and the effect that this may have on victims' expectations about their impact statement. It is possible that providing educative materials may be insufficient in dispelling all victims' misconceptions about the role of impact statements. For example, Leverick, Chalmers and Duff found that even where victims were provided with extensive written materials explaining the purpose and function of victim impact statements, some still misunderstood

¹⁴⁶ Leverick, Chalmers and Duff, above n 27.

¹⁴⁷ Ibid 8.

¹⁴⁸ Ibid 38.

¹⁴⁹ Ibid 6.

¹⁵⁰ Erez, above n 92, 553.

¹⁵¹ Parliament of South Australia, above n 144, 7.

aspects of the scheme. As they noted, 'it may be that some of these misunderstandings were the result of victims simply not reading the statement scheme literature (where all of these issues are addressed) or it may be that a further educational effort is necessary.'¹⁵²

Nonetheless, this research clearly indicates that better-informed victims submitted their impact statements for reasons other than to influence the sentence imposed on the offender. Accordingly, it appears that information and education are an effective means of reducing the problem of victim disappointment around the use of victim impact statements at sentencing.

VII WHY DO VICTIMS SUBMIT IMPACT STATEMENTS?

Having established that a proportion of victims do submit impact statements for the purpose of influencing sentence, many researchers have sought to determine other reasons that victims may choose to submit a statement.

Communicative or expressive purposes are widely acknowledged by victims to be a significant reason for submitting impact statements. Research conducted by the Commissioner for Victims and Witnesses in England and Wales found that many victims valued the opportunity to submit their statement because it allowed them to share with the court the way that the crime had affected them.¹⁵³ Similarly, 60 per cent of the victims interviewed by Hoyle et al,¹⁵⁴ and just over a third of the victims in the Scottish study conducted by Leverick, Chalmers and Duff, submitted impact statements for expressive purposes.¹⁵⁵

Furthermore, 44 per cent of the victims interviewed by Konradi and Burger in the US indicated that they participated in sentencing 'to reduce their fear of the defendant, to force him to acknowledge that he had injured them and to resolve

¹⁵² Leverick, Chalmers and Duff, above n 27, 91.

¹⁵³ Commissioner for Victims and Witnesses in England and Wales, *Victims' Views of Court and Sentencing* (2011) 25.

¹⁵⁴ Hoyle et al, above n 26, 26.

¹⁵⁵ Leverick, Chalmers and Duff, above n 27. 56.

nagging pain and feelings of guilt.’¹⁵⁶ Some victims also indicated that they wished to put their story on record by providing their victim impact statements,¹⁵⁷ and others found that ‘the sentencing hearing provided many of them with the chance to describe what happened in their own way, without having to weigh the expectations of attorneys or the perceptions of judges and jurors.’¹⁵⁸

Miller found that the victims she interviewed in Canada had completed impact statements primarily to share with the offender the way that the offence made them feel.¹⁵⁹ Her research, which focused solely on victims of sexual offences, revealed that many victims also tended to ‘repurpose’ their statements outside of instrumental or expressive approaches — that is, the victims used their statements for a purpose other than sharing with the court the harm they had suffered. Miller found that victims commonly used their statements for the purpose of explaining their suffering to other parties, such as families and loved ones, who may not otherwise have understood their experience.¹⁶⁰

In sum, victims submit impact statements for a variety of reasons, many of which are expressive and communicative. Some do submit for the purpose of influencing the sentence imposed on the offender. However, as noted above, this is a problem that can be addressed by providing relevant victim support and education. It could also be improved by enhanced clarity around impact schemes generally, as will be explored throughout this thesis.

VIII HOW DO VICTIMS FEEL AFTER SUBMITTING THEIR IMPACT STATEMENT?

Because victim dissatisfaction was a key rationale for the introduction of victims’ rights, including victim impact statements, numerous researchers have sought to determine whether victim satisfaction levels have actually increased as a result

¹⁵⁶ Konradi and Burger, above n 74, 369.

¹⁵⁷ Ibid 365.

¹⁵⁸ Ibid 367.

¹⁵⁹ Miller, above n 6.

¹⁶⁰ Ibid.

of the right to submit a statement. As will be explored in this section, earlier research was less likely to reveal positive outcomes for victims, while more recent research has generally found that victims largely do feel satisfied with their choice to submit an impact statement. For example, Leverick, Chalmers and Duff found that 86 per cent of the victims in their Scottish study thought that submitting an impact statement was the right thing to do and nearly two-thirds found that submitting their statements made them feel better.¹⁶¹

In contrast, Sanders et al found that while 77 per cent of victims in their UK study initially felt that submitting a victim impact statement was the right decision, only 57 per cent continued to believe this by the time their case ended.¹⁶² Sanders et al also found that although one third of victims who submitted statements felt better after doing so, 18 per cent felt worse.¹⁶³ As a result, Sanders et al have argued that impact statement schemes are not particularly successful in terms of therapeutic benefits.¹⁶⁴ However, Chalmers, Duff and Leverick have dismissed this criticism on the basis that a satisfaction level of 57 per cent is still a clear majority and is by no means an indication of general dissatisfaction.¹⁶⁵

Erez found that, following the completion of an impact statement, victims reported feeling relieved and satisfied,¹⁶⁶ and that 'for the majority of victims, filing the statement was a worthwhile therapeutic experience, and the cathartic effect of recording the impact of the offence had been an end in itself.'¹⁶⁷ These findings are consistent with those of the Commissioner for Victims and Witnesses in England and Wales. The Commissioner's study found that victims perceived impact statements to be useful for helping the court to understand

¹⁶¹ Leverick, Chalmers and Duff, above n 27, 57.

¹⁶² Sanders et al, above n 92, 450.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Chalmers, Duff and Leverick, above n 84, 369.

¹⁶⁶ Erez, above n 92, 551-552.

¹⁶⁷ Ibid 552.

what had happened to them, so that, for example, the victim wasn't just 'another number' to the judicial officer.¹⁶⁸

Meredith and Paquette found that completing an impact statement enabled victims to:

- Vent their anger;
- Confront their offender in a safe environment;
- Include in their statements information that they had been prevented from providing when giving evidence; and
- Bring to the court's attention the total impact of the offence.¹⁶⁹

In addition, victims felt that impact statements gave offenders the opportunity to think more seriously about the harm they had caused.¹⁷⁰ Meredith and Paquette also found that some victims reported a cathartic effect in preparing their statements, and that by reviewing and listing the effects of the crime, these victims felt that they were 'better able to put some issues behind them and move on with their lives.'¹⁷¹

The Victorian Government's Department of Justice found that, for some victims, the process of reading their victim impact statement out loud, as opposed to having it handed up to the judge or having another person read it in court, provided a sense of power or strength.¹⁷² One victim interviewed by the Department of Justice reported that 'when I [read my VIS aloud in court] he had to listen ... I was in control ... It was like a reverse role... he had to listen ... It's something I'll never regret. It gave me strength.'¹⁷³

¹⁶⁸ Commissioner for Victims and Witnesses in England and Wales, above n 153, 25.

¹⁶⁹ Meredith and Paquette, above n 30, 10.

¹⁷⁰ Ibid.

¹⁷¹ Ibid 6.

¹⁷² Victorian Department of Justice, *Victim Impact Statement Reforms in Victoria Interim Implementation Report* (Victorian Government, June 2014) 30.

¹⁷³ Ibid.

The Victorian Victim Support Agency found that victims generally had positive views about their use of impact statements, though several determinants affected their levels of satisfaction. These included:

- Whether victims understood, and had accurate expectations of, the impact statement process (in particular an understanding of how their statement would be used);
- Whether victims received adequate information and support in preparing their statement; and
- Whether the experience of presenting the statement in court went well.¹⁷⁴

Lens et al conducted surveys and interviews with Dutch victims of crime who were eligible to complete victim impact statements.¹⁷⁵ Their research found that the act of delivering an impact statement did not directly give rise to therapeutic benefits for the research participants. Nevertheless, Lens et al argued that ‘the effectiveness of delivering a VIS should not be viewed as a “black or white” issue,’¹⁷⁶ because they did find that victims’ feelings of anxiety decreased when they felt a sense of procedural justice through the process of submitting their impact statement.

In comparison to much of the other research discussed above, Davis and Smith’s earlier 1994 research found that participating in the sentencing process did not increase victim satisfaction.¹⁷⁷ However, their study involved victims who engaged in recorded interviews about their experience of victimisation. The interview transcripts were used by caseworkers employed by the research project to draft each victim’s impact statement.¹⁷⁸ This research approach was similar to the then-current practice in England and Wales, where victims’ statements were not written or presented by the victim; rather, the statement

¹⁷⁴ Victorian Victim Support Agency, above 31, cited in Mossman, above n 71, 82.

¹⁷⁵ Kim ME Lens et al, ‘Delivering a Victim Impact Statement: Emotionally Effective or Counterproductive?’ (2015) 12(1) *European Journal of Criminology* 17.

¹⁷⁶ Ibid 31.

¹⁷⁷ Robert C Davis and Barbara E Smith, ‘Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?’ (1994) 22(1) *Journal of Criminal Justice* 1.

¹⁷⁸ Ibid 5.

was taken in writing by a police officer and submitted to the court in that format.¹⁷⁹

It is arguable that the cathartic and therapeutic effects experienced by many victims from the process of putting their own thoughts on paper, or by verbally sharing their experiences with the court, cannot be compared to a situation where the victim impact statement is prepared and submitted by a person other than the victim.¹⁸⁰ Furthermore, it should be noted that since that study was undertaken, impact statement procedures in England and Wales have been amended and victims are now entitled to present their statements personally to the court, as is the case in all Australian jurisdictions.¹⁸¹

IX VICTIM IMPACT STATEMENTS AND VICTIMS OF SEXUAL OFFENDING

As discussed in Chapter 1, this thesis focuses on sentencing in sexual offence cases because there has been very little research undertaken into the impact statement experiences of victims of sexual offences specifically.¹⁸² Previous research has commonly excluded victims of sexual offending, or failed to distinguish their experiences from those of other victims of crime. Miller has explained that:

The few studies that were designed to specifically examine VIS use by sexually assaulted women are now outdated, did not originally include empirical data

¹⁷⁹ Julian V Roberts and Marie Manikis, 'Victim Personal Statements in England and Wales: Latest (and Last) Trends from the Witness and Victim Experience Survey' 13(3) (2012) *Criminology and Criminal Justice* 248.

¹⁸⁰ This issue is explored further in Roberts and Erez, above n 94, 232. It should be noted that Leverick, Chalmers and Duff have argued that levels of satisfaction with the victim statement scheme do not differ significantly according to whether the statement was self-completed or was completed by a police officer/other criminal justice professional in Leverick, Chalmers and Duff, above n 27. However, this argument is based on data collected no later than 1998, i.e. at a time in which impact statements had only just been introduced in many jurisdictions. As such, it is possible that this data may no longer be accurate, due to modern victim impact statement legislation and procedures, which have changed in many ways throughout the past 19 years.

¹⁸¹ Ministry of Justice, England and Wales, *Code of Practice for Victims of Crime* (October 2013).

¹⁸² Du Mont, Miller and White, above n 33, 7.

from victims, or combined victims' use of the VIS with other forms of criminal justice participation, which made meaningful interpretation difficult.¹⁸³

Even the ACT Government's most recent research into sexual assault victims' experiences of the criminal justice system only mentions victim impact statements in passing.¹⁸⁴ This is despite the fact that the act of submitting an impact statement meets two of the long-established justice needs of victims of sexual offending, namely the need to participate in the justice process,¹⁸⁵ and the need for voice.¹⁸⁶ It has therefore been argued that 'completing a VIS or having the opportunity to do so, ... [is] essential to a sexually assaulted woman's therapeutic well-being.'¹⁸⁷

Du Mont, Miller and White¹⁸⁸ did recently examine the perspectives of Canadian social workers who had supported or counselled sexual offence victims in relation to those victims' impact statements. Their results were consistent with earlier research on impact statement schemes generally. The social worker respondents believed that their clients could find the completion of their statement therapeutic: 'words such as "closure," "healing," and "empowerment" were used to describe the writing process in and of itself.'¹⁸⁹ It was also found that by submitting their impact statements, victims felt listened to by judicial officers.¹⁹⁰

¹⁸³ Miller, above n 6, 1445. This is demonstrated by the table contained in Appendix 1, which details previous interview and survey research undertaken with victims or justice professionals.

¹⁸⁴ ACT Government, *A Rollercoaster Ride: Victims of Sexual Assault: Their Experiences With and Views about the Criminal Justice Process in the ACT* (2009).

¹⁸⁵ Daly, above n 16; Shapland, Willmore and Duff, above n 17, 78.

¹⁸⁶ Daly above n 16; Lievore, above n 18.

¹⁸⁷ Miller, above n 6, 1447.

¹⁸⁸ Du Mont, Miller and White, above n 33.

¹⁸⁹ Ibid 17.

¹⁹⁰ Ibid.

But overall, research into the sentencing experiences of sexual offence victims, particularly empirical research with victims from Australia, is lacking.¹⁹¹ Accordingly, there is a clear gap in our knowledge and understanding of the views of sexual offence victims on their experiences of impact statements and sentencing. Notably, Du Mont, Miller and White recommended that further research be undertaken by way of in-depth interviews with sexual offence victims themselves to continue the exploration of the benefits of, and issues with, impact statement schemes in sexual offence matters.¹⁹²

X JUDICIAL ACKNOWLEDGMENT OF VICTIM IMPACT STATEMENTS

One theme that has emerged in the recent literature is the value of judicial acknowledgment of the victim and their impact statement at sentencing.¹⁹³ Erez revealed through research with victim advocates that victims' satisfaction with the criminal justice system is increased when the judicial officer acknowledges or validates the harm suffered by the victim.¹⁹⁴ This is particularly so when the judicial officer quotes the victim's own words in the sentencing remarks.¹⁹⁵ Erez has explained that:

Victims feel gratified when their sense of harm is validated in judges' remarks. Victim advocates in Australia as well as in the United States indicate that victims who have heard or read sentencing comments in which judges quote their impact statements in sentencing remarks often say, 'I could not believe the judge has actually listened to what I had to say.'¹⁹⁶

These findings confirm that victims' justice needs can be met not only through

¹⁹¹ Previous research with sexual offence victims by Konradi and Burger and Miller was conducted in North America.

¹⁹² Du Mont, Miller and White, above n 33, 21.

¹⁹³ Julian V Roberts and Erez, above n 94, 232; Mary Lay Schuster and Amy Propen, 'Degrees of Emotion: Judicial Responses to Victim Impact Statements' (2010) 6 *Law, Culture and the Humanities* 77.

¹⁹⁴ Erez, above n 92, 553; Mary Lay Schuster and Amy Propen, *Victim Impact Statement Study* (WATCH, 2006) 7.

¹⁹⁵ Katz, above n 70, 209.

¹⁹⁶ Erez, above n 92, 553.

the act of submitting an impact statement, but also through the actions of the court upon receiving the statement. Effective judicial acknowledgment of the victim and their statement can meet victims' needs to be treated with respect,¹⁹⁷ and their need for:

- Voice, which includes the ability to share the story of what has happened in a public setting, where the victim can receive public recognition and acknowledgment;¹⁹⁸
- Validation, which involves affirmation that the victim is believed;¹⁹⁹ and
- Vindication, which involves the recognition that what happened to the victim was wrong.²⁰⁰

This is supported by the findings of Regehr and Alaggia, who interviewed victim advocates in Canada.²⁰¹ These interviews revealed that judicial reference to victims made victims believe that the judge had understood them.²⁰² Meredith and Paquette also found through their victim focus groups that when judicial officers made explicit reference to victim impact statements in sentencing, the acknowledgment was greatly appreciated by victims.²⁰³ Meredith and Paquette explained that this validation was found to be beneficial to the victims, 'even if they did not believe that the VIS had made any real difference in terms of the sentence imposed.'²⁰⁴ These findings are consistent with Tyler's theory of procedural justice,²⁰⁵ which maintains that being treated with dignity and respect is more important to victims than a particular sentence or punishment.²⁰⁶ The victims interviewed by Meredith and Paquette indicated that they would encourage judicial officers to acknowledge in sentencing both the

¹⁹⁷ Payne, above n 22; McGlynn, above n 22.

¹⁹⁸ Daly, above n 16; Lievore, above n 18.

¹⁹⁹ Daly, above n 16; Bluett-Boyd and Fileborn, above n 19.

²⁰⁰ Daly, above n 16; Herman, above n 20.

²⁰¹ Regehr and Alaggia, above n 30.

²⁰² Ibid 38.

²⁰³ Meredith and Paquette, above n 30, 9.

²⁰⁴ Ibid 10.

²⁰⁵ Tom R Tyler, 'Social Justice: Outcome and Procedure' (2000) 35 *International Journal of Psychology* 117.

²⁰⁶ See, for example, Victorian Law Reform Commission, above n 28, 56.

effort that victims put into completing their statements and the content of the statements.²⁰⁷

These findings were further confirmed by Young and Roberts, who found that victims appreciated judicial recognition of the harm they had experienced, and that victim satisfaction could be increased where victims are able to read sentencing remarks in which their impact statements were acknowledged.²⁰⁸ The Victorian Government also found that victims believed it to be 'very validating when they were able to tell that a judge had read their VIS through their judicial comments.'²⁰⁹ Similarly, the Victorian Victim Support Agency found a strong link between judicial recognition of impact statements and victims' satisfaction with the process of making the statement. The Agency considered this to be so significant that it recommended the Judicial College of Victoria develop information for judicial officers outlining the importance of recognising impact statements in court.²¹⁰

There already appears to be a high level of understanding of this matter among members of the judiciary. The Victim Support Agency's 2009 survey of judicial officers revealed that almost all of the 42 judicial officers who participated in their research were aware of the importance of recognising the victim and their impact statement in the sentencing process.²¹¹ Eighty-one per cent of those judicial officers stated that they would either always, or almost always, refer to an impact statement or its contents in their reasons for sentence.²¹² Further, 97

²⁰⁷ Meredith and Paquette, above n 30, 9.

²⁰⁸ A Young and Julian V Roberts, Canada Department of Justice, *Research on the Role of the Victim in the Criminal Process in Canada* (Policy Centre for Victim Issues, 2001) cited in Julian V Roberts and Marie Manikis, *Victim Personal Statements: A Review of Empirical Research* (Report for the Commissioner for Victims and Witnesses in England and Wales, 2011).

²⁰⁹ Victorian Department of Justice, above n 172, 57.

²¹⁰ Victorian Victim Support Agency, above n 31, 82. This recommendation has not yet been implemented by the Judicial College of Victoria, who have explained that lack of funding has prevented this from occurring: Victorian Department of Justice, above n 172, 28.

²¹¹ Victorian Victim Support Agency, above n 31, 12.

²¹² *Ibid.*

per cent of the 41 judicial officers who were asked the same question by the Victim Support Agency in 2012 reported that they would always refer to an impact statement in their reasons for sentence.²¹³ Similarly, O'Connell found that all surveyed judicial officers in South Australia reported that, when provided with information about victim impact, they often or almost always referred to it in their sentencing remarks.²¹⁴ Roberts and Edgar also found that most Canadian judges surveyed reported that they often or almost always referred to the victim's impact statement in their reasons for sentence.²¹⁵

However, these findings have not been independently verified. Only one other author has published research examined or quantified actual judicial practice in acknowledging victims and their impact statements at sentencing, and this research concerned only family victims of homicide offending.²¹⁶ A gap therefore exists between our understanding of what judges say they do in this regard, and our understanding of what they actually do in practice.

XI CONCLUSION AND SUMMARY OF RESEARCH GAPS

Victim participation in sentencing was a controversial issue when first introduced. However, as victim impact statements have become widely legislated for and increasingly accepted, criticism of their use has eased, and fears surrounding the potential for negative outcomes have faded after these anticipated outcomes failed to materialise. Those who support the use of victim impact statements at sentencing believe that they help to empower the victim and can therefore reduce the incidence of victims feeling ignored by the court and aggrieved by the criminal justice system.²¹⁷ This view can be supported by research that shows a strong connection between victim participation and levels

²¹³ Victorian Department of Justice, above n 172, 58.

²¹⁴ O'Connell, above n 31, 7.

²¹⁵ Julian V Roberts and Allen Edgar, *Victim Impact Statements at Sentencing: Judicial Experiences and Perceptions. A Survey of Three Jurisdictions* (Department of Justice Canada, 2006).

²¹⁶ See Booth, above n 32.

²¹⁷ Tyler, above n 205; Adam Webster, 'Expanding the Role of Victims and the Community in Sentencing' (2011) 35 *Criminal Law Journal* 21, 33.

of satisfaction with the criminal justice system.²¹⁸ An increased role in the criminal justice system is also believed to assist victims with their psychological recovery,²¹⁹ which some Australian judges have described as the 'social rehabilitation' of the victim.²²⁰ Supporters of impact statements have argued that because submitting a statement increases the victim's satisfaction and cooperation with the criminal justice system, this therefore enhances the efficacy of the justice system as a whole.²²¹

Impact statements can be understood as having benefits for victims and the wider criminal justice process, whether used for instrumental or expressive purposes. When used for expressive purposes, victims can experience a number of therapeutic outcomes from completing and submitting a statement. These can stem from the therapeutic act of putting the harm experienced into words, from presenting the statement to the court, and from receiving acknowledgment from the judicial officer that the victim has experienced harm. As O'Connell has argued:

Many victims have an innate need to 'tell their stories', including describing the harm done to them ... Many derive personal benefits, even a sense of closure, when the harm done to them is formally acknowledged in sentencing remarks.²²²

In contrast, when used for instrumental purposes, the information contained in an impact statement may assist judicial officers to impose a more commensurate sentence, and therefore increase the effectiveness of sentencing regimes generally.

However, this Chapter has identified a number of gaps in our understanding of existing impact statement regimes. First, there is an overarching problem of the lack of clarity around the purpose of statements, which affects the information

²¹⁸ Davis and Smith, above n 177, 1.

²¹⁹ Ibid 2.

²²⁰ See, for example, *DPP v DJK* [2003] VSCA 109 [17]-[18] (Vincent JA).

²²¹ Katz, above n 70, 191.

²²² O'Connell, above n 31, 11-12.

that can be included in statements and the way in which they can be used by the court. Secondly, research into impact statement experiences of victims of sexual offending is sparse. Consequently, Du Mont, Miller and White have recommended that further research be undertaken by way of in-depth interviews with victims of sexual offences to explore their experiences of victim impact statements and of the sentencing process.²²³ This thesis, which involves in-depth interviews with victims of sexual offending and experienced justice professionals, is the first Australian study to begin to fill this knowledge gap.

Furthermore, although the importance of judicial acknowledgment of victim impact at sentencing has recently been recognised, nearly all research undertaken to date has consisted only of interviews or surveys with judicial officers as to their self-reported sentencing practices. There is a dearth of research examining actual judicial practice in respect of victim acknowledgment during the sentencing process. Accordingly, there exists a clear knowledge gap as to the actual use of and reference to victim impact statements in judicial officers' sentencing remarks. This thesis also seeks to fill that knowledge gap by exploring judicial reference to impact statements at sentencing, with a specific focus on sentencing in sexual offence cases.

The thesis next examines the legislation, case law, policies and guidelines that guide the use of victim impact statements in Australia. This discussion identifies the unclear parameters within which victims and judges must work when preparing and receiving impact statements, and frames the analysis contained throughout the remainder of the thesis.

²²³ Du Mont, Miller and White, above n 33, 21.

CHAPTER 3:

VICTIM IMPACT STATEMENTS:

A REVIEW OF LEGISLATIVE PRINCIPLES AND POLICIES

I	Introduction	47
	<i>A Sources of Impact Statement Law and Policy</i>	48
II	Definition of ‘Victim’	49
III	Victim Recognition and Sentencing Legislation in Australia	49
IV	Content of Victim Impact Statements	52
V	Timeframes for Preparing Victim Impact Statements	54
VI	Presenting Victim Impact Statements	56
VII	Alternative Arrangements for Verbal Presentation.....	57
VIII	Admissibility of Victim Impact Statements.....	59
IX	Dealing with Inadmissible Materials.....	60
X	Rules for Cross-Examination.....	63
XI	Therapeutic Value of Victim Impact Statements.....	64
XII	The Absence of Victim Impact Statements	65
XIII	Conclusion	66

I INTRODUCTION

Legislation, case law, court practices, policies and guidelines, and individual judicial approaches determine how judicial officers, justice professionals, and victims apply and experience victim impact statement schemes. Therefore, legislation and case law should clearly establish the purpose or purposes of impact statement regimes and their philosophical foundation. Related policies and guidelines should then create procedures that implement and conform to the underlying purposes. This Chapter analyses the legal and regulatory frameworks for victim impact statements in Australia, focusing particularly, though not exclusively, on the jurisdictions involved in this research project.²²⁴ It examines

²²⁴ This Chapter explores only the legislative principles and policies that arose as issues in the textual analysis of sentencing remarks (see Chapter 5), or in the interviews

legislation, judicial interpretations of that legislation, policies and guidelines, and considers if and how they designate the purposes of the regimes they create, interpret and/or implement, and whether those purposes are consistently instituted in relevant procedures. This investigation is significant because if victim impact statement legislation fails to contain clear statements of purpose and/or if any legislated purpose is not reflected in procedures instituted by courts and prosecution agencies, then inconsistency or confusion will be replicated in judicial approaches to impact statements, and victims' experiences of these statements.

A Sources of Impact Statement Law and Policy

At common law, judicial officers are permitted to take into consideration, when sentencing, the effect that the crime has had on the victim. In *Siganto v The Queen*, Gleeson CJ, Gummow, Hayne and Callinan JJ of the High Court described 'the undoubted proposition that a sentencing judge is entitled to have regard to the harm done to the victim by the commission of the crime. That is the rule at common law.'²²⁵ In addition to the common law, sentencing legislation has been enacted in all Australian states and territories. These legislative instruments codify common law principles of sentencing and also contain specific victim impact statement provisions. Victim participation in the sentencing process is also guided by policies and procedures implemented by agencies such as the courts and Offices of Public Prosecutions.²²⁶ Some procedures, such as the *Court Rules* in each jurisdiction, are legally binding. Others, such as the prosecution policies issued by each jurisdiction's prosecuting agency, are not binding but do appear to be closely followed by the relevant agencies.²²⁷ Therefore, as Kirchengast has explained, 'the powers that allow for victim participation are

conducted for this thesis (see Chapter 6). For a broader overview of impact statement legislation, principles and policies in Australia, see Booth, above n 92.

²²⁵ *Siganto v The Queen* (1998) 194 CLR 656, 666.

²²⁶ These are referred to as the DPP in the Australian Capital Territory, Northern Territory, South Australia, and Tasmania, the OPP in Victoria, and the ODPP in NSW, Queensland and Western Australia.

²²⁷ See, for example, Section III of Chapter 6, which explores the practical implementation of one aspect of the Victorian OPP Prosecution Policy.

inherently diverse and fragmented. They are not consolidated within one source nor are they provided over a set of coherently organised sources.’²²⁸ This Chapter consolidates these incoherently organised sources into a number of chronologically ordered themes, ranging from pre-trial through to post-sentencing.

II DEFINITION OF ‘VICTIM’

The definition of a victim for the purpose of presenting a victim impact statement varies across jurisdictions.²²⁹ Consequently, it is possible that a person may be considered a victim of crime for the purpose of presenting an impact statement in one jurisdiction, but considered ineligible in another. However, in relation to this thesis, it is important to note that victims of sexual offending are permitted to present impact statements in all Australian jurisdictions, and their family members may also be provided the right to do so in some circumstances.²³⁰

III VICTIM RECOGNITION AND SENTENCING LEGISLATION IN AUSTRALIA

In some jurisdictions, recognition of the victim is a specific purpose of the sentencing legislation. For example, in the ACT under the *Crimes (Sentencing) Act 2005* (ACT), one of the purposes of sentencing is ‘to recognise the harm done to the victim of the crime and the community.’²³¹ Accordingly, in deciding how an offender should be sentenced, the court must take into account the effect of the offence on the victim.²³² Similarly, in Tasmania, the *Sentencing Act 1997* (Tas)

²²⁸ Tyrone Kirchengast, ‘Participation of Victims of Crime in New South Wales Court Processes’ (Victims Services NSW, 2014) 19.

²²⁹ See *Crimes (Sentencing) Act 2005* (ACT) ss 47, 49(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26; *Sentencing Act 1995* (NT) s 106A; *Victims of Crime Assistance Act 2009* (Qld) s 5(1); *Criminal Law (Sentencing) Act 1988* (SA) s 7A(1); *Sentencing Act 1997* (Tas) s 81A; *Sentencing Act 1991* (Vic) s 3(1); *Sentencing Act 1995* (WA) s 13.

²³⁰ For example, see *Crimes (Sentencing) Act 2005* (ACT) s 49(1)(c). See also *Marchant v Police* [2000] SASC 100 [16]-[17] (Bleby J).

²³¹ *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g).

²³² *Ibid* s 33(1)(f).

states that one of the purposes of the Act is to recognise the interests of victims.²³³

The *Criminal Law (Sentencing) Act 1988* (SA) provides that, in sentencing an offender, the court must consider the personal circumstances of any victim of the offence, and any injury, loss or damage resulting from the offence.²³⁴ Likewise, the *Sentencing Act 1991* (Vic)²³⁵ specifies that, in sentencing an offender, the court must have regard to the impact of the offence on any victim of the offence, the personal circumstances of any victim, and any injury, loss or damage resulting directly from the offence.²³⁶

Table 3.1: Recognition of the Victim Under the Research Jurisdictions' Sentencing Acts

Jurisdiction	Legislation	Relevant Provision
ACT	<i>Crimes (Sentencing) Act 2005</i> (ACT) s 7(1)(g) <i>Crimes (Sentencing) Act 2005</i> (ACT) s 33(1)(f)	A court may impose a sentence on an offender ... to recognise the harm done to the victim of the crime and the community. ... In deciding how an offender should be sentenced ... a court must consider [if relevant] ... the effect of the offence on the victim.
SA	<i>Criminal Law (Sentencing) Act 1988</i> (SA) ss 10(1)(d) - 10(1)(e)	In determining the sentence for an offence, a court must have regard to as may be relevant ... the personal circumstances of any victim of the offence [and] any injury, loss or damage resulting from the offence.
Tasmania	<i>Sentencing Act 1997</i> (Tas) s 3(h)	The purpose of this Act is to recognise the interests of victims of offences.

²³³ *Sentencing Act 1997* (Tas) s 3(h). Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) is also consistent with the ACT and Tasmanian Acts.

²³⁴ *Criminal Law (Sentencing) Act 1988* (SA) ss 10(1)(d) - 10(1)(e).

²³⁵ *Sentencing Act 1991* (Vic) s 5(2AC)(2).

²³⁶ The *Sentencing Act 1995* (NT) s 5(2)(b) and *Penalties and Sentences Act 1992* (Qld) s 9(2) also provide that in sentencing, the court must have regard to any physical, psychological or emotional harm done to a victim.

Jurisdiction	Legislation	Relevant Provision
Victoria	<i>Sentencing Act 1991</i> (Vic) s 5(2AC)(2)	In sentencing an offender, a court must have regard to the impact of the offence on any victim of the offence, the personal circumstances of any victim of the offence, and any injury, loss or damage resulting directly from the offence.

As Table 3.1 shows, the provisions across these jurisdictions are not consistent in terms of how the court should recognise the victim and/or their impact statement, or clear about what weight the judicial officer can or should give to this recognition when sentencing the offender.²³⁷ The requirement that the court must consider any injury to the victim in the ACT, or that they must consider the personal circumstances of the victim, including any injury, loss or damage in South Australia, suggests that victim impact statements can or should factor into a judge's decision-making when sentencing, as does the Victorian requirement that the judge 'must have regard to the impact of the offence.' These provisions are consistent with victim impact statements having an instrumental purpose. In contrast, the phrasing of the recognition of 'the interest of victims' in the Tasmanian Act is so vague that it does not explicitly or implicitly convey either an instrumental or expressive approach. Consequently, Crawford J observed in *Attorney-General for Tasmania v B*²³⁸ that no provision in the Tasmanian Act specifically compels the judicial officer to consider an impact statement in the course of sentencing.²³⁹ As first identified in Chapter 2, this inconsistency and lack of clarity around how the court should use impact statements influences a number of the research findings, and is explored in detail in Chapter 6.

²³⁷ See also Booth, above n 92, 36.

²³⁸ [2010] TASCRA 6.

²³⁹ Similarly, the *Sentencing Act 1995* (WA) s 24 merely states that a victim 'may give a victim impact statement to a court to assist the court in determining the proper sentence for the offender.'

IV CONTENT OF VICTIM IMPACT STATEMENTS

Victims are generally restricted, both in form and content, as to the type of information they are allowed to present to the court about the harm they have suffered as a consequence of the offending. The permissible form and content of impact statements is guided by both legislation and policy documents. The Tasmanian and South Australian Acts allow only for written statements,²⁴⁰ while the Victorian and ACT Acts are more flexible, allowing for the inclusion of photographs, drawings or other images, and, in Victoria, poems.²⁴¹

The ACT, South Australia, Tasmania, and Victoria all have very similar content guidelines, which are not mandated by legislation, but rather published through each jurisdiction's victim support or witness assistance service.²⁴² Victoria's guidelines are the most comprehensive where harm and injury are concerned, explaining that a victim impact statement can detail the following:

Emotional impact. You might want to describe any emotional impacts of the crime, including:

- Your general feelings of wellbeing or enjoyment of life
- How the crime has affected any relationships (with your partner, family, friends or co-workers)
- Any emotions or feelings related to the crime (such as hurt, anger, fear, frustration)
- Effects on your lifestyle and activities (such as trouble sleeping, eating, working)

²⁴⁰ *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Sentencing Act 1997* (Tas) s 81A.

²⁴¹ *Sentencing Act 1991* (Vic) s 8L(2); *Crimes (Sentencing) Act 2005* (ACT) s 51(6). Queensland also allows for photographs, drawings and other images under the *Victims of Crime Assistance Act 2009* (Qld) s 15(9)(c)(ii), as does NSW under the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30(1A).

²⁴² See ACT Government Victim Support, *Victim Impact Statements* <<http://www.victimsupport.act.gov.au/what-we-do/victim-impact-statements>>; South Australian Office of the Department of Public Prosecutions, *Victim Impact Statements* <<http://www.dpp.sa.gov.au/was/witnesses/victim-impact-statements-viss>>; Tasmanian Department of Justice Victim Support Services, *Victim Impact Statements* <<http://www.justice.tas.gov.au/victims/vis>>; Victorian Government Department of Justice and Regulation, *Victim Impact Statements in Victoria* <<http://www.victimsofcrime.vic.gov.au/home/going+to+court/victim+impact+state+ments>>.

- Psychological effects of the crime, including any treatment required (such as depression, anxiety, stress).

Physical impact. This might include:

- Injuries as a result of the crime (such as broken bones, nerve damage)
- How injuries have affected your life (such as work, sport or leisure activities)
- Any long term impacts of injuries on your life
- Any medical treatment required including future or ongoing medical treatment.

Financial impact. This might include:

- Loss of earnings because of the crime (if a physical or psychological injury has affected your ability to work)
- General expenses caused by the crime (such as home security, replacing items)
- Travel expenses because of the crime (such as court appearances)
- Medical treatment needed because of the crime (such as ongoing treatment for a recurring injury the crime caused).

Social impacts. You might describe problems the crime has caused in your daily life, including how the crime has affected:

- Work or study commitments
- Family or social life (friendships, social events, sporting commitments)
- How safe you feel.²⁴³

Most information guides also provide information about what should not be included in a statement. These are consistent across the ACT, Tasmania and Victoria, and state that victims should not include in their statement:

- Any detailed description of the crime
- Anything offensive, threatening, intimidating or harassing
- Abuse or vilification of the offender
- Details or impacts of other crimes or offences you have experienced
- Opinion on the sentence the court should give. Concentrate only on how the offence has affected you.

²⁴³Victorian Government Department of Justice and Regulation, *Victim Impact Statements in Victoria* <<http://www.victimsofcrime.vic.gov.au/home/going+to+court/victim+impact+statements>>.

These restrictive guidelines appear to promote an instrumental approach to the permissible content of impact statements in the ACT, Tasmania, and Victoria

In contrast, the South Australian information form does not specifically list information that is not permitted to be included in a statement. Rather, it says 'the judge or magistrate can take [the impact statement] into account when sentencing the convicted person,' but that 'information not related to the impact of the crime may not be allowed or is unlikely to be considered by the judge.'²⁴⁴ This implicit freedom suggests a more expressive approach to impact statement content in South Australia. However, South Australia is also the only jurisdiction examined in this research project whose sentencing legislation allows a victim to express a view on the offender's sentence in an impact statement.²⁴⁵ This may instead imply that victims' views could have some instrumental effect on sentence, though the legislation does not actually indicate what the judge can or should do if provided with a victims' view on the offender's sentence. This again demonstrates the inconsistency in impact statement regimes within and across the jurisdictions.

V TIMEFRAMES FOR PREPARING VICTIM IMPACT STATEMENTS

While neither legislation nor policy documents in the ACT and Tasmania contain suggested timeframes for the preparation of victim impact statements, the Victorian Guide to Victim Impact Statements indicates that impact statements 'should not be given to police or prosecutors until someone is found guilty or pleads guilty to a crime.'²⁴⁶ To similar effect, the South Australian DPP Prosecution Policy says that statements 'should be prepared prior to sentencing

²⁴⁴ South Australian Office of the Department of Public Prosecutions, *Victim Impact Statements* <<http://www.dpp.sa.gov.au/was/witnesses/victim-impact-statements-viss>>.

²⁴⁵ *Criminal Law (Sentencing) Act 1988* (SA) s 7C. The Northern Territory is the only other jurisdiction in Australia to provide this right, under the *Sentencing Act 1995* (NT) s 106B(5a).

²⁴⁶ Victorian Government Department of Justice and Regulation, *Victim Impact Statements in Victoria* <<http://www.victimsofcrime.vic.gov.au/home/going+to+court/victim+impact+statements>>.

submissions.’²⁴⁷ The sentencing legislation in some jurisdictions, including Victoria and South Australia, also requires that a written copy of any impact statement be provided to the court and the offender prior to the sentencing hearing.²⁴⁸ This implies an instrumental approach in those jurisdictions, since a key aspect of the instrumental use of an impact statement is that the defence be allowed the opportunity to view and challenge the information contained within the statement.

Case law suggests that problems can arise if impact statements are completed too early in the court process. One such problem was described by Gleeson CJ in the NSW case of *R v Bakewell*:

Where a person is charged with a certain offence and the Crown accepts a plea of guilty to a lesser offence, it is often the case that the victim of the crime gives an account of the circumstances which, if true, means that the offender was, in reality, guilty of the more serious offence.²⁴⁹

Taking these circumstances into account when sentencing would contravene the principle in *R v de Simoni*, namely, ‘that no one should be punished for an offence of which he has not been convicted.’²⁵⁰

The situation described by Gleeson CJ in *Bakewell* eventuated in the Western Australian case of *Hooper v The Queen*.²⁵¹ In that case, the offender was originally charged with manslaughter, but was ultimately convicted of assault occasioning actual bodily harm. However, the victim impact statements had been prepared in relation to the manslaughter charge. Steytler J of the Western Australian Court of

²⁴⁷ South Australian Office of the Director of Public Prosecutions, *Prosecution Policy and Guidelines* <<http://www.dpp.sa.gov.au/publications/prosecution-policy-guidelines>> Guideline 13.

²⁴⁸ *Sentencing Act 1995* (NT) s 106B(8); South Australian Supreme Court *Criminal Rules* 2014, Rule 90; South Australian District Court *Criminal Rules* 2014, Rule 90; South Australian Magistrates Court *Rules (Criminal)* 1992, Rule 41.06; *Sentencing Act 1991* (Vic) s 8N. Under the *Crimes (Sentencing) Act 2005* (ACT) s 53(2), a copy of the statement is not required to be handed up if the statement is only presented verbally.

²⁴⁹ *R v Bakewell* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, 27 June 1996) 8.

²⁵⁰ *R v de Simoni* (1981) 147 CLR 383, 389.

²⁵¹ [2003] WASCA 179.

Appeal found that the statements were inadmissible, as the harm described by the victim's family related to the death of the victim rather than the offence for which the offender was convicted:

The victim impact statements which were admitted in this case dealt ... only with the shock and grief suffered by those who gave them as a result of the death of the victim. Given the somewhat unusual circumstances of this case, in which the appellant had not been found to be criminally responsible for the death and was to be sentenced only for an assault occasioning bodily harm, they were not, in my opinion, admissible.²⁵²

The participants interviewed for this thesis indicate that issues around the inclusion of information about conduct for which the offender is not ultimately convicted arise regularly in practice. This would not be a problem under an expressive impact statement regime, because the judge would not take the statement into account when sentencing. Conversely, if used instrumentally, including this information would be problematic, because the judge might rely on it in determining the offender's punishment. This conflict is explored further in Chapter 6.

VI PRESENTING VICTIM IMPACT STATEMENTS

The rules for presenting impact statements vary by jurisdiction.²⁵³ The ACT Act stipulates that an impact statement may be made in writing or given orally in court, and must be read aloud if the author of the statement wishes to do so.²⁵⁴ If not made or given by the primary victim of the offence, the impact statement may be presented only with the express consent of the victim.²⁵⁵ In Tasmania, the impact statement may either be read to, or read by, the court,²⁵⁶ and must be

²⁵² *Hooper v The Queen* [2003] WASCA 179 [30].

²⁵³ See, for example *Sentencing Act 1995* (WA) s 25; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 30-30A; *Sentencing Act 1995* (NT) s 106B; *Victims of Crime Assistance Act 2009* (Qld) ss 15-15B.

²⁵⁴ *Crimes (Sentencing) Act 2005* (ACT) s 50.

²⁵⁵ *Ibid* s 51(3).

²⁵⁶ Tasmanian Supreme Court, *Criminal Rules* 2006.

read out loud upon the request of the statement's author.²⁵⁷ In South Australia, the impact statement must be given to the court in writing, and must be read out at sentencing, either by the author of the statement, or by another person.²⁵⁸ The victim-focused rules for presentation in these three jurisdictions do not conform to standard procedures for presenting evidence, and are therefore inconsistent with an instrumental approach to victim impact statements. In contrast, in Victoria, impact statements may be made in writing by statutory declaration or in writing and presented orally by sworn evidence.²⁵⁹ The requirement for the statement to be in the form of a statutory declaration or given via sworn evidence goes beyond the requirements of the other jurisdictions, and is consistent with an instrumental approach.²⁶⁰ However, the author of the impact statement may request that any part of it be read aloud to the court, by the author, the prosecutor, or a person chosen by the author and approved by the court, which is more consistent with an expressive approach.²⁶¹ Accordingly, the requirements for presentation of impact statements in Victoria illustrate another example of inconsistency in impact statement regimes within and across the jurisdictions.

VII ALTERNATIVE ARRANGEMENTS FOR VERBAL PRESENTATION

When compared with the other research jurisdictions, Victoria provides the most flexible arrangements to support victims who read their statements aloud to the court.²⁶² These include allowing the victim to present their statement from another room via CCTV, obscuring the victim's view of the offender during presentation, allowing a support person to stand beside the victim while the

²⁵⁷ *Sentencing Act 1997* (Tas) s 81A(4).

²⁵⁸ *Criminal Law (Sentencing) Act 1988* (SA) s 7A.

²⁵⁹ *Sentencing Act 1991* (Vic) s 8K.

²⁶⁰ No other Australian jurisdiction requires that the impact statement be given in the form of a statutory declaration, and 15A of the *Victims of Crime Assistance Act 2009* (Qld) explicitly states that victim impact statements may be read out loud upon request, but that 'it is not necessary for a person, reading aloud the victim impact statement ... to do so under oath or affirmation.'

²⁶¹ *Sentencing Act 1991* (Vic) s 8Q.

²⁶² *Ibid* s 8R(1).

statement is read, closing the court or restricting those who can be present in the courtroom while the statement is being read, and requiring lawyers not to be robed during presentation.²⁶³

The South Australian Act also allows for vulnerable witness provisions to be invoked when a victim impact statement is being presented to the court.²⁶⁴ However, this will be allowed only where the court considers there is good reason to do so.²⁶⁵ These provisions include the presentation of the statement via CCTV, or in court with the protection of a screen, or in a closed court.²⁶⁶ The ACT Act allows for the victim of a sexual offence to present their impact statement via audiovisual link,²⁶⁷ and the *Evidence (Miscellaneous Provisions) Act 1991* (ACT)²⁶⁸ further allows that, if the victim is likely to suffer severe emotional trauma because of the nature of the offence, the victim may present their statement in a closed court²⁶⁹ or in court with the protection of a screen,²⁷⁰ and have a support person present during their presentation.²⁷¹ In contrast to the other jurisdictions, the Tasmanian Act does not contain any provisions allowing for flexible presentation of impact statements.²⁷² Instead, the *Evidence (Children and Special Witnesses) Act 2001* (Tas) (the *Special Witnesses Act*) may apply. This allows the court to declare witnesses to be 'special' where, among other things,

²⁶³ Similar provisions are provided under s 15B of the *Victims of Crime Assistance Act 2009* (Qld).

²⁶⁴ *Criminal Law (Sentencing) Act 1988* (SA) s 7A(3a).

²⁶⁵ *Ibid.*

²⁶⁶ South Australian Office of the Director of Public Prosecutions, *Vulnerable Witness Provisions* <<http://www.dpp.sa.gov.au/was/witnesses/vulnerable-witness-provisions-vwps>>.

²⁶⁷ *Crimes (Sentencing) Act 2005* (ACT) s 52(4)(b). Section 30A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) also allows for presentation of a statement via audiovisual link. Further, in August 2017, the *Justice Legislation Amendment Act 2017* (NSW) amended the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A to provide that all victims of prescribed sexual offences must be allowed to read their statement in a closed court unless the court directs otherwise.

²⁶⁸ *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38(2)(c).

²⁶⁹ *Ibid* s 39(3).

²⁷⁰ *Ibid* s 38C(3).

²⁷¹ *Ibid* s 38E(3).

²⁷² Similarly, no flexibility provisions are provided by Northern Territory or Western Australian legislation.

the nature of the subject matter of the evidence is likely to cause severe emotional trauma or distress. Special witnesses may then be allowed to give evidence in a closed court or via audio-visual link, and to have a support person with them while they are giving evidence.²⁷³ Chapter 6 further explores the subject of alternative arrangements for presentation of statements, and discusses problems that arose in victim interviews around the operation of the *Special Witnesses Act* in Tasmania.

VIII ADMISSIBILITY OF VICTIM IMPACT STATEMENTS

There is some, albeit limited, authority on the admissibility requirements of victim impact statements. To be admissible in the ACT, an impact statement must be ‘a statement made by or for a victim of the offence that contains details of any harm suffered by the victim because of the offence.’²⁷⁴ In *R v Iacuone; R v Duffy; R v JR (No. 2)*, Burns J detailed the ACT Supreme Court’s approach to the reception of evidence of harm claimed in a victim’s impact statement. His Honour clarified that such harm need not be proven beyond reasonable doubt. The test for admissibility is instead relevance:

In deciding how an offender is to be sentenced, the court must consider any VIS. In addition, in sentencing an offender, the court must take into account any injury, loss or damage resulting from the offence as well as the effect of the offence on the victim, their family or anyone else who may make a victim impact statement. It does not follow from this requirement that the test of admissibility of details of harm in a VIS is whether the court is satisfied beyond a reasonable doubt that the harm occurred as a result of the offence. Courts frequently receive evidence which is ultimately not accepted as establishing a fact to the requisite standard. Admissibility in that regard depends on relevance, and if the proposed evidence of harm is arguably relevant it will usually be received, with the question of what it proves to be determined by the sentencing judge.²⁷⁵

²⁷³ *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8.

²⁷⁴ *R v Shephard* [2008] ACTSC 116 [26] (Refshauge J).

²⁷⁵ *R v Iacuone; R v Duffy; R v JR (No. 2)* [2014] ACTSC 149 [24] (Burns J) (citations omitted).

However, if there is a dispute over the contents of a statement, the Victorian Court of Appeal has determined that any facts asserted may only be accepted if, once the judicial officer makes clear that they plan to ‘make full use of relevant material ... there is express or tacit acquiescence by counsel for either side.’²⁷⁶ Otherwise, such statements must only be used by the court if their disputed content is established beyond reasonable doubt.²⁷⁷

IX DEALING WITH INADMISSIBLE MATERIALS

Different approaches have been taken across the jurisdictions regarding the process for dealing with inadmissible material within victim impact statements. Some jurisdictions require that such material be removed from the statement prior to it being tendered.²⁷⁸ If this does not occur, defence counsel is entitled to object to the inadmissible material in the statement.²⁷⁹ In the ACT, Refshauge J has encouraged defence counsel to make such objections, citing concerns that impact statements will lose their value if defence counsel do not intervene in matters where inadmissible material is provided to the court:

While defence counsel may be wary of exercising their rights to cross-examine a victim on a Victim Impact Statement, discussions with prosecutors should result in an appropriate response from responsible prosecutors about inadmissible material and such statements. Without that proper approach, it is likely that such statements will lose their value and that the courts will have to intervene to ensure that the legislation is respected to ensure inadmissible, and often inflammatory, material is not included in such statements.²⁸⁰

²⁷⁶ *Arthurs v The Queen; Plater v The Queen* [2013] VSCA 258 [36] (Redlich JA, Coghlan JA and Forrest AJA).

²⁷⁷ *R v Olbrich* (1999) 199 CLR 270.

²⁷⁸ NSW Office of the Director of Public Prosecutions, *Prosecution Guidelines* <<http://www.odpp.nsw.gov.au/prosecution-guidelines>> Guideline 19; Queensland Government, *Office of the Director of Public Prosecutions Director's Guidelines* <http://www.justice.qld.gov.au/_data/assets/pdf_file/0015/16701/directors-guidelines.pdf> Guideline 47(iv).

²⁷⁹ *R v Shepherd* [2008] ACTSC 116 [28].

²⁸⁰ *Grimshaw v Mann* [2013] ACTSC 189 [41]. Refshauge J has written on several occasions about perceived inadequacies of processes surrounding the preparation and presentation of victim impact statements in the ACT. For example, in *R v Schmidt* [2013] ACTSC 295 [74], his Honour said: ‘there were some matters in the Victim

Similarly, Ipp J of the Western Australian Supreme Court has stated that there is a duty on defence counsel 'to object timeously to impermissible material in victim impact statements.'²⁸¹ However, in the event that an impact statement contains inadmissible material not otherwise objected to, Refshauge J has explained that judicial officers 'are expected to be able to set aside material they have viewed which must be ignored because irrelevant or inadmissible.'²⁸²

In South Australia, the Supreme, District, and Magistrate Courts *Criminal Rules* all stipulate that a judicial officer may direct that irrelevant material in an impact statement not be read out to the court.²⁸³ Similarly, under the Tasmanian Supreme Court *Criminal Rules*, the judicial officer may direct the victim not to read any part of the impact statement that the court considers irrelevant to the proceedings.²⁸⁴ These rules suggest an instrumental approach to impact statement content.

In Victoria, a different approach has been adopted. The Victorian Act does not provide guidance on how to deal with inadmissible material in impact statements. In order to circumvent both the wariness of defence counsel to object to inadmissible material, and the wariness of prosecution counsel to edit victim's statements, a hybrid process has been developed. The Victorian DPP Director's Policy describes it as follows:

Impact Statements that were not in accordance with the legislation ... In order to preserve the value and acceptability of such statements, I urge those charged with helping victims to prepare them to pay close attention to the legislation and comply with it.' Further, in *R v MT* [2014] ACTSC 162 [54], 'As I have said before, those who assist victims to compose such statements should take care to see that the statutory constraints are observed, else there is a danger that the value of such statements will be undermined.'

²⁸¹ *Mitchell v The Queen* [1998] WASCA 334.

²⁸² *Welch v R* [2011] ACTCA 19 [70].

²⁸³ South Australian Supreme Court *Criminal Rules* 2014, Rule 90; South Australian District Court *Criminal Rules* 2014, Rule 90; South Australian Magistrates Court *Rules (Criminal)* 1992, Rule 41.06.

²⁸⁴ Tasmanian Supreme Court *Criminal Rules* 2006, Part 2.

It is a matter for the sentencing judge to determine the admissibility of the material in a victim impact statement. However, where a prosecutor has possession of a victim impact statement and identifies clearly inadmissible material, he or she should bring it to the attention of the court to prevent sentencing error ... Where a victim impact statement is to be read aloud by the victim or their representative and the statement contains material likely to be regarded as inadmissible, except where the material is scandalous, the prosecutor should submit that the victim or their representative be allowed to read the statement out in full. It should be submitted that the court should then decide what parts of the statement it considers to be admissible. Where the prosecutor considers that parts of the victim impact statement are likely to be regarded by the court as inadmissible, the defence and the court should be put on notice of the prosecutor's view. The prosecutor should not engage in editing or vetting the victim impact statement as it is the court's role to determine the admissibility of the victim impact statement.²⁸⁵

This approach, which contains elements of both expressive and instrumental approaches, has advantages for all participants in the sentencing process, as Nettle JA explained in *R v Swift*:

[C]ounsel appearing before sentencing judges have tended not to say a great deal about the admissibility of the contents of victim impact statements. In effect, they have left it to sentencing judges to work out which parts of a statement are admissible and may be relied upon. Such an approach is to some extent contrary to mainstream criminal practice, where the taking of objections tends to be punctilious. But it has considerable advantages ... It also accords with the observations of Charles JA in *R v Dowlan* and of Vincent JA in *DPP v DJK* that it would be destructive of the purpose of victim impact statements if their reception in evidence were surrounded and confined by the sorts of procedural rules which are applicable to the treatment of witness statements in commercial cases.²⁸⁶

²⁸⁵ Victorian Office of Public Prosecutions, *DPP Prosecution Policies* <<http://www.opp.vic.gov.au/Resources/DPP-s-policies>> Rules 43-44, 48.

²⁸⁶ *R v Swift* [2007] VSCA 52 [7] (citations omitted).

Interviews with justice professionals and with victims reveal differing opinions on the current approaches to issues of statement content and admissibility across the jurisdictions. These differences appear to stem from inconsistencies in the interviewees' understanding of the purpose of impact statements. This issue is explored further in Chapter 6.

X RULES FOR CROSS-EXAMINATION

Dealing with disputed or contested material in impact statements may involve verification of their content via cross-examination.²⁸⁷ This is allowed under both the ACT²⁸⁸ and Victorian Acts.²⁸⁹ Similarly, the Tasmanian Act requires that the sentencing court ensures the offender has the opportunity to challenge the information contained in a victim impact statement.²⁹⁰ If this occurs, the court may require the information to be proved in like manner as if it were received at a trial.²⁹¹ As a result, the victim may be required to give sworn evidence and be cross-examined. However, Slicer J of the Tasmanian Supreme Court has noted that in order to allow cross-examination of a victim, 'real need must be shown rather than ritualistic objection'²⁹² to the content of the statement. Unlike the other research jurisdictions, South Australia has not legislated for cross-examination of victims on the content of their impact statement. However,

²⁸⁷ There are no provisions allowing for cross-examination of victims in relation to their impact statements under the Queensland or Western Australian Sentencing Acts. However, the Queensland Government's *Office of the Director of Public Prosecutions Director's Guidelines* <<http://www.justice.qld.gov.au/corporate/justice-agencies/office-of-the-director-of-public-prosecutions>> Guideline 25(iii) says that victims should be warned that they can be cross-examined on their statement, as does the Director of Public Prosecutions for Western Australia, *Statement of Prosecution Policy and Guidelines* <http://www.dpp.wa.gov.au/_files/statement_prosecution_policy_2005.pdf>, Appendix 4. In NSW, it has been held that the *Crimes (Sentencing Procedure) Act 1999* (NSW) 'does not appear to envisage that cross-examination on the content of the statement would be permitted': *R v Wilson* [2005] NSWCCA 219 [27] (Simpson J). However, a recent consultation paper released by the New South Wales Sentencing Council, above n 29, suggests that cross-examination does occasionally occur in NSW.

²⁸⁸ *Crimes (Sentencing) Act 2005* (ACT) s 53(3).

²⁸⁹ *Sentencing Act 1991* (Vic) s 80(2).

²⁹⁰ *Sentencing Act 1997* (Tas) ss 81A(7) and 81(2).

²⁹¹ *Attorney-General for Tasmania v B* [2010] TASCRA 6 [57].

²⁹² *Owen v R* [2003] TASSC 53 [58].

research suggests that, in accordance with the common law, cross-examination does occur occasionally.²⁹³ Therefore, each of the research jurisdictions demonstrates an instrumental approach to the issue of cross-examination on victims' impact statements. However, the interviews with justice professionals reveal that cross-examination of victims over their impact statements is anti-therapeutic and can result in their re-traumatisation. This issue is explored in Chapter 6.

XI THERAPEUTIC VALUE OF VICTIM IMPACT STATEMENTS

The cathartic or therapeutic value of presenting a victim impact statement has been recognised by the legislature in Queensland and at common law in South Australia. Section 15(4) of the *Victims of Crime Assistance Act 2009* (Qld) specifically notes the benefits victims might gain from reading their statement aloud, stating: '[t]o avoid any doubt ... the purpose of the reading aloud of the victim impact statement before the court is to provide a therapeutic benefit' to the victim.²⁹⁴

Similarly, in the South Australian case of *R v Leach*, Perry J explained:

The legislative provisions as to victim impact statements are predicated upon the view that it is in the interests of justice that the victim of a crime is entitled to have a statement as to the impact of the crime upon him or her aired publicly during the sentencing process. Quite apart from the evident public interest in such a procedure being part of the sentencing process, the public airing of the impact of the offending upon the victim may in some cases assist the victim to come to terms with the effect of the crime upon them.²⁹⁵

²⁹³ Frequency of cross-examination of victims on their victim impact statements is discussed in South Australian Government, 'Survey of Victims of Crime' (Justice Strategy Unit, 2000).

²⁹⁴ Cathartic or therapeutic benefits are not mentioned in the legislation in any other jurisdiction.

²⁹⁵ *R v Leach* [2003] SASC 92 [59].

Bleby J in *R v Leach* also recognised that presenting a victim impact statement ‘assists in bringing some closure to the victim.’²⁹⁶ The therapeutic benefits of presenting a victim impact statement, and in particular the benefits of presenting a statement verbally, are advocated by many of the interviewed justice professionals, and are particularly important if impact statements are viewed as having an expressive purpose. This subject is also explored further in Chapter 6.

XII THE ABSENCE OF VICTIM IMPACT STATEMENTS

The absence of a victim impact statement does not invalidate a sentencing decision.²⁹⁷ Courts are often in a position to assess the harm caused by the offending based on the offence type and any circumstances surrounding the offending. As Southwell, Ormiston and McDonald JJ explained in *R v Miller*, sentencing judges are ‘entitled to draw reasonable inferences from the evidence before [them] of any injury, loss or damage suffered by victims and their immediate families.’²⁹⁸ Similarly, Gray P, Refshauge and Ryan JJ noted in *R v Eisenach* that even ‘without specific evidence, a sentencing court will be aware of the destructive effects of offences.’²⁹⁹ To like effect, Refshauge J stated in *R v MT* that ‘in some cases, the Court will be aware of at least the general nature of the harm suffered or, at the very least, the likely harm by offences.’³⁰⁰

The absence of a victim impact statement cannot be used to make any assumption about the effect of the offending on the victim. Section 53(1)(b) of the *Crimes (Sentencing) Act 2005* (ACT) is a reminder of this. It stipulates that, when sentencing, the judicial officer must not draw any inference about the harm suffered by a victim from the fact that an impact statement is not presented

²⁹⁶ Ibid [66].

²⁹⁷ See, for example, *Criminal Law (Sentencing) Act 1988* (SA) s 7(3).

²⁹⁸ *R v Miller* [1995] 2 VR 348, 354.

²⁹⁹ *R v Eisenach* [2011] ACTCA 2 [65].

³⁰⁰ *R v MT* [2014] ACTSC 162 [58].

to the court.³⁰¹ Accordingly, while a victim impact statement may hold weight as one of the many factors to be considered when sentencing, the lack of a victim impact statement cannot be a mitigating factor.³⁰² As Neave JA explained in *DPP v Gerrard*, 'there are many reasons why a victim may choose not to make a victim impact statement and no authority supports the view that this should be treated as a mitigating factor in sentencing.'³⁰³

The justice professionals interviewed for the present research suggest several reasons why victims may choose not to submit an impact statement. These are also discussed in Chapter 6.

XIII CONCLUSION

In every jurisdiction across Australia, victim participation in the sentencing process is guided by a range of legislative instruments, case law, policies, and guidelines that are 'inherently diverse and fragmented.'³⁰⁴ This Chapter has consolidated an analysis of this regulatory framework around a number of organising themes, to assess whether and how legislated procedures for victim impact statement regimes manifest and comply with their express or implicit statements of purpose.

This analysis has identified that there is no explicit indication as to whether instrumental or expressive purposes actually underlie impact statement regimes in Australia, and that implied indicators of purpose are confusing and sometimes contradictory, both within and across the jurisdictions.³⁰⁵ This finding will frame much of the research outcomes and analysis contained within Chapter 6.

³⁰¹ *Crimes (Sentencing) Act 2005* (ACT) s 53(1)(b). Similarly, see *Victims of Crime Assistance Act 2009* (Qld) s 15(6); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29(3).

³⁰² See also, for example, *Sentencing Act 1995* (NT) s 106B(6).

³⁰³ *DPP v Gerrard* (2011) 211 A Crim R 171, 172.

³⁰⁴ Kirchengast, above n 228, 19.

³⁰⁵ As similarly argued by Booth, above n 92, 36.

This thesis next discusses the research approach and research methods. This includes justification of the research design, the ethical issues that arose in preparing to interview victims of sexual offending, the interview process and analysis, and the analysis undertaken of the sentencing remarks dataset.

CHAPTER 4: RESEARCH APPROACH

I	Introduction	68
II	Research Aims and Theoretical Lens.....	69
III	Choosing the Research Approach.....	70
	<i>A Content Analysis as a Research Method</i>	<i>71</i>
	<i>B Interviews as a Research Method.....</i>	<i>72</i>
	<i>C Choosing Research Jurisdictions.....</i>	<i>72</i>
IV	Interviews with Victims and Justice Professionals.....	73
	<i>A The Research Participants.....</i>	<i>73</i>
	<i>B Ethical Issues in Conducting Research with Victims of Sexual Offending</i>	<i>74</i>
	<i>C Preparing for the Interviews.....</i>	<i>76</i>
	<i>D Identifying Victim Participants</i>	<i>77</i>
	<i>E Recruiting Victim Participants.....</i>	<i>78</i>
	<i>F Recruiting Justice Professionals.....</i>	<i>80</i>
	<i>G Conducting the Interviews.....</i>	<i>82</i>
V	Interview Analysis.....	83
	<i>A The Interview Transcripts</i>	<i>83</i>
	<i>B Coding the Interview Transcripts</i>	<i>83</i>
VI	Sentencing Remarks Analysis	85
	<i>A The Sentencing Remarks.....</i>	<i>85</i>
	<i>B Coding the Sentencing Remarks.....</i>	<i>87</i>
VII	Limitations of the Research	88
VIII	Conclusion	90

I INTRODUCTION

As identified in the previous Chapters, victim impact statements and sentencing processes are rarely explored in the context of victims of sexual offending, particularly in Australia. The practical use of impact statements by judicial officers when sentencing is also poorly understood. This Chapter first identifies the research aims that guide this thesis. The theoretical bases for the chosen research approaches are then explored. Finally, the research methods are

outlined, including the documentation of issues and obstacles confronted throughout the course of the research.

II RESEARCH AIMS AND THEORETICAL LENS

The current literature shows that ‘the study of VIS and their ability to meaningfully satisfy victims by giving them input into the sentencing phase remains a work in progress.’³⁰⁶ This is particularly true of victims in sexual offence matters. Consequently, it has been recommended that further research be undertaken by way of in-depth interviews with victims of sexual offences to explore their experiences of victim impact statements and the sentencing process.³⁰⁷ Furthermore, although the importance of judicial acknowledgment of the victim at sentencing has recently been recognised, there has been very limited research undertaken to examine actual judicial practice in this regard. Accordingly, this research has three aims:

1. To gain a better understanding of victim perspectives of victim impact statement and sentencing processes and procedures in sexual offence cases;
2. To explore judicial practice in relation to the use of and reference to victim impact statements at sentencing in sexual offence cases; and
3. To determine whether any recommendations can be made for policy or legislative reform to achieve best practice for victim impact statement processes and procedures from a victim-focused perspective.

The theoretical lens for this thesis is detailed in Chapter 1. As explained there, the research is approached through a lens of therapeutic jurisprudence, which is not strictly a theory, but rather a way of looking at the law.³⁰⁸ This approach underpinned the research design, which was constructed to obtain information about, and focus the analysis on, the therapeutic or anti-therapeutic effect of impact statement and sentencing processes on victims. Therefore, guided by its

³⁰⁶ Sankoff and Wansborough, above n 61, 29.

³⁰⁷ Du Mont, Miller White, above n 33, 21.

³⁰⁸ Jo-Anne Wemmers, ‘Victim Participation and Therapeutic Jurisprudence’ (2008) 3 *Victims and Offenders* 165.

first two research aims, this thesis uses a therapeutic jurisprudence approach to achieve its third research aim, namely to determine whether any recommendations can be made for policy or legislative reform to enable best practice for victim impact statement processes and procedures, both inside and outside the courtroom. Accordingly, it is an applied study.³⁰⁹ These recommendations, which have implications for judicial practice, as well as for the practice of other justice professionals, such as prosecutors, witness assistance officers, and victim support agencies, attempt to reduce the legal system's anti-therapeutic effects, and enhance outcomes for victims when preparing and submitting a victim impact statement.

III CHOOSING THE RESEARCH APPROACH

In designing the research approach, it was recognised that there is inherent conflict between traditional positivist and interpretivist approaches to empirical research. On the one hand, a positivist seeks to identify truth, while an interpretivist believes that a singular truth does not exist, because 'reality is socially constructed rather than objectively determined.'³¹⁰ The conflict between these two approaches is particularly apparent when planning empirical legal research. This is because there is a positivist underpinning to any law reform project, namely the assumption that some objective findings and recommendations can be made about the legal system. However, the data collected must be understood as subjective, particularly when derived from participants in the legal process who may have been deeply affected by the issue that is the subject of the research.³¹¹

³⁰⁹ David E Gray, *Doing Research in the Real World* (SAGE, 2nd ed, 2009); W Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Pearson Education, 7th ed, 2009) 26.

³¹⁰ Mark Easterby-Smith, Richard Thorpe and Andy Lowe, 'The Philosophy of Research Design' in Nigel Bennett, Ron Glatter and Rosalind Levacic (eds), *Improvising Educational Management: Through Research and Consultancy* (SAGE, 1994) 78.

³¹¹ Max Travers, 'Evaluation Research and Legal Services' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005).

Consequently, a pragmatic research approach was chosen for this thesis. Creswell has explained that a pragmatist holds the view that no methodological approach is intrinsically better than another, and that researchers should choose the methods of research that best meet their needs and purposes.³¹² Accordingly, content analysis was chosen to analyse the transcripts of sentencing remarks delivered by judges, and a qualitative interview design was chosen to obtain data from victims and justice professionals on their experiences of victim impact statement and sentencing processes.

A Content Analysis as a Research Method

Content analysis is a research method that can be used to identify and describe trends, patterns, and differences across texts, with the intention of drawing empirical inferences from those texts.³¹³ According to Babbie, ‘content analysis is particularly well suited to the study of communications and to answering the classic question ... “who says what, to whom, why, how and with what effect?”’³¹⁴ Consequently, it is well suited to exploring the communication that judges direct at victims during a sentencing hearing. While traditionally a social science research method, content analysis has more recently been viewed as a useful tool for empirical legal scholars.³¹⁵ As Hall and Wright explained:

Content analysis makes legal scholarship more consistent with the basic epistemological underpinnings of other social science research. The method combines a disciplined focus on legal subject matter with an assumption that other investigators should be able to replicate the research results.³¹⁶

Content analysis involves a process known as ‘coding’, which ‘distills data, sorts them, and gives us a handle for making comparisons with other segments of

³¹² John Creswell, *Research Design: Qualitative, Quantitative and Mixed Method Approaches* (SAGE Publications, 2009) 10-11.

³¹³ Brendan Churchill, ‘Content Analysis’ in Maggie Walter (ed), *Social Research Methods* (Oxford University Press, 3rd ed, 2013) 255.

³¹⁴ Earl Babbie, *Social Research Counts* (Cengage Learning, 2013) 168.

³¹⁵ Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010).

³¹⁶ Mark A Hall and Ronald F Wright, ‘Systematic Content Analysis of Judicial Opinions’ (2008) 96 *California Law Review* 63, 65.

data.’³¹⁷ The processes used for the collection of sentencing transcripts and the coding that was undertaken are explained further in Section VI below.

B Interviews as a Research Method

Interviews were undertaken with victims and justice professionals in preference to questionnaires because issues in sexual offence cases are complex and potentially distressing. The sensitive nature of the subject matter meant that questionnaires would not have been appropriate as a data collection method. In contrast, interviews enabled a relationship of trust to be developed with participants, particularly victims, which allowed for comprehensive and sensitive exploration of the research issues.

Interviews also suited the exploratory nature of this research,³¹⁸ because they enabled a degree of flexibility to be incorporated into the data collection process. As Bell has explained, a ‘major advantage of the interview is its adaptability. A skilful interviewer can follow up ideas, probe responses and investigate motives and feelings, which the questionnaire can never do.’³¹⁹

The relationship of trust built with the interview subjects, and the flexible nature of the interview process, also enabled the researcher to be alert to and respond to any adverse reactions experienced by victims. The interview process and measures taken to reduce the likelihood of such reactions are detailed below in subsection G.

C Choosing Research Jurisdictions

The research was conducted in a number of jurisdictions. This allowed both for the comparison of different approaches, and the identification of best practice, across the research jurisdictions.

³¹⁷ Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (SAGE, 2006) 3.

³¹⁸ Jennifer Mason, *Qualitative Researching* (SAGE, 1996) 42.

³¹⁹ Judith Bell, *Doing Your Research Project* (Open University Press, 4th ed, 2005) 157.

The four jurisdictions chosen were the ACT, South Australia, Tasmania, and Victoria. These were selected for pragmatic reasons, with accessibility of sentencing remarks being the most significant factor.³²⁰ Sentencing remarks for the ACT are all published permanently on the ACT Supreme Court website.³²¹ South Australian sentencing remarks are published on the Courts Administration Authority website for a period of time after sentence is passed.³²² Tasmanian sentencing remarks are permanently published on the Tasmanian Supreme Court website,³²³ and some, though not all, remarks from Victoria are published on the AustLII website.³²⁴ The interviews were also undertaken in those jurisdictions, to ensure that the interview findings could be contextualised by the analysis of current sentencing practices in the same jurisdictions.

IV INTERVIEWS WITH VICTIMS AND JUSTICE PROFESSIONALS

A The Research Participants

Interviews were undertaken with adult victims of sexual offending (n= 6), and with a variety of justice professionals, including prosecutors (n = 3), witness assistance workers (n = 5), and victim support workers (n = 7). It was noted in Chapters 1 and 2 that research about victim impact statements has generally not involved empirical research with sexual offence victims themselves. Reasons for this approach may include ethical and practical problems, such as access to research participants and concern for participants' safety. Both of these problems arose in the course of conducting this research, and are addressed below.

³²⁰ See Appendix 3, which contains a table detailing sentencing remark availability across Australia.

³²¹ ACT Supreme Court, *Judgments* <<http://www.courts.act.gov.au/supreme/judgment/index/cat/2/page/>>.

³²² Courts Administration Authority of South Australia, *Sentencing Remarks* <http://www.courts.sa.gov.au/sent_remarks/index.html>.

³²³ Supreme Court of Tasmania, *Sentences – Publication* <<http://www.supremecourt.tas.gov.au/decisions/sentences>>.

³²⁴ AustLII, *County Court of Victoria* <<http://www.austlii.edu.au/au/cases/vic/VCC>>.

Notwithstanding these issues, undertaking interviews with both victims and justice professionals has allowed for a rich analysis of victim experiences from multiple and sometimes contradictory perspectives. The importance of exploring a diversity of views is clearly demonstrated by the interview findings discussed in Chapters 5, 6 and 7. This is especially true of the findings detailed in Chapter 7, which identify systemic problems affecting victims around their right to information about court and sentencing processes. The interviews demonstrate that some problems may be misunderstood or overlooked even by experienced justice professionals. Without personally interviewing victims, it is likely that the victims' rights problems would never have been identified and subsequently raised in the interviews undertaken with justice professionals. Accordingly, the benefits of directly interviewing victim participants greatly outweighed the difficulties encountered in planning and conducting this component of the research.

B Ethical Issues in Conducting Research with Victims of Sexual Offending

There are a number of specific ethical issues involved in undertaking research with vulnerable participants such as victims of crime. The most significant issue is the potential for participant distress.³²⁵ The interviews,³²⁶ which asked victims to recount their experiences of preparing and submitting their victim impact statements, had the potential to cause anxiety and/or distress for the participants if their experience at sentencing was negative, or if the discussion of the sentencing process raised memories of trauma surrounding the offending.

To understand approaches taken by other researchers when working with vulnerable participants, a review was undertaken of research that asked potentially traumatised research participants questions about their trauma.³²⁷

³²⁵ See Tracey Booth, 'Researching Sensitive Topics, Emotion Work and the Qualitative Researcher: Interviewing Bereaved Victims of Crime' in Lorana Bartels and Kelly Richards (eds), *Qualitative Criminology: Stories from the Field* (Hawkins Press, 2011).

³²⁶ See interview question schedules in Appendices 8 and 9.

³²⁷ It should be noted that the research for this thesis was not designed to ask the participants about their trauma experiences, but the research plan allowed for the

The results of this review suggest that even if victims are reminded of the traumatic nature of the offending by their research participation, this will not necessarily have an overall negative or distressing effect on the victim participant. For example, Edwards et al found that:

Distress engendered through sexual assault research participation is minimal and, for most participants, outweighed by personal benefits. Although these data suggest that this type of research may be distressing to a few women, negative emotional reactions are not limited to those with sexual victimization histories, and most women who report being upset indicate that they would participate again and do not expect to experience distress in the future.³²⁸

It is significant that Edwards et al found that women with various forms of sexual victimisation histories, except those who had a history involving sexual abuse as a child (who were specifically excluded from this research), reported greater personal benefits from participating in the research than women without such histories.³²⁹

Other studies had similar results. For example, Yeater et al found that while more severely victimised women reported greater mental costs from participating in sensitive research than less severely victimised women,³³⁰ participation in such research was generally not distressing even to sexually victimised women.³³¹ Similarly, Edwards et al found that 'it is not victimization per se, but the psychological sequelae associated with victimization (or other traumatic/stressful experiences) that most strongly predict immediate negative emotional reactions.'³³²

possibility that the semi-structured interview format could result in a discussion of these matters if the victim participant wished it.

³²⁸ Katie Edwards et al, 'College Women's Reactions to Sexual Assault Research Participation: Is It Distressing?' (2009) 33 *Psychology of Women Quarterly* 225, 233.

³²⁹ Ibid 232.

³³⁰ Elizabeth Yeater et al, 'Trauma and Sex Surveys Meet Minimal Risk Standards: Implications for Institutional Review Boards' (2012) 23(7) *Psychological Science* 780, 784.

³³¹ Ibid 785.

³³² Katie M Edwards et al, 'Women's Reactions to Interpersonal Violence Research: A Longitudinal Study' (2013) 28(2) *Journal of Interpersonal Violence* 254, 268.

Overall, these findings suggest that for the vast majority of women, participation in interpersonal trauma research is not distressing, even if the participants have a history of trauma such as adult sexual victimisation. Nonetheless, a number of strategies were implemented in the present research project to prevent victim distress, including the strict inclusion criteria detailed below, and the arrangement of support from each victim's support worker during and after the interview. The project information sheet³³³ also contained the contact details for various 24-hour support services in the event that the participant required out of hours assistance following the interview.

To adhere to standards for ethical research, and to ensure the confidentiality and anonymity of victim participants, only minimal contact details and identifying information were sought from victims. Following the transcription of the interviews, each participant was assigned a pseudonym, and all recordings were deleted. No permanent record containing identifying information about the participants has been retained.

C Preparing for the Interviews

All high-risk ethics applications require that a list of proposed interview questions be provided to the university ethics committee for approval. The interview questions, which were similar for all research participants, were modelled on those used by Booth for her PhD research.³³⁴ Booth's questions were identified as an ideal starting point because her research explored the victim impact statement experiences of family victims of homicide offences. Her success in interviewing vulnerable victim participants on the topic of their impact statements suggested that her interview question design would also

³³³ See Appendix 4.

³³⁴ Tracey Booth, *Accommodating Justice: An Exploratory Study of Structures and Processes that Shape Victim Participation and the Presentation of Victim Impact Statements in the Sentencing of Homicide Offenders in the NSW Supreme Court* (PhD Thesis, University of New South Wales, 2013).

work effectively in interviewing victims of sexual offending about their impact statement experiences.³³⁵

D Identifying Victim Participants

The victim participants for this research were chosen on the basis of strict inclusion criteria. The participants were required to be:

- Adult female victims of sexual offending that had resulted in a conviction,³³⁶ who
 - Were receiving or had received support from a victim support or witness assistance agency;
 - Had submitted a victim impact statement during the sentencing process; and
 - Had retained a copy of their impact statement and the sentencing remarks for their trial.

The participants were all at least 18 years old at the time that the offending occurred — that is, the research design specifically excluded victims of childhood sexual offending. This category of victim participants was chosen based on the research detailed above, which indicates that victim participants do not tend to be negatively affected by participating in research about their trauma, except where that trauma involved childhood sexual abuse.

The victim participants were required to have a copy of their victim impact statement and the sentencing remarks from their trial.³³⁷ This choice was made as a strategy to prevent re-traumatisation of the research participants. It was important that the participants had already read, processed, and understood the

³³⁵ The full list of interview questions as approved by the University of Tasmania Social Science Human Research Ethics Committee can be found in Appendices 8 and 9. The process for conducting the interviews is described in subsection G below.

³³⁶ Female victims were chosen because of the prevalence of female sexual victimisation. In Australia, females are around five to six times more likely than males to be a victim of sexual assault: Australian Bureau of Statistics, 'Gender Indicators Australia' (Cat No 4125.0, February 2016).

³³⁷ If the victim participant no longer held copies of these documents, their support workers were asked to provide file copies.

sentencing remarks in their case. It would not have been appropriate to ask them to read the remarks for the first time in the lead-up to the interview, because this may have deprived them of the time needed to adequately process the information contained therein.

Having access to copies of the participants' impact statement and sentencing remarks was also important from the interviewer's perspective for two reasons. First, these documents provided a comprehensive overview of each matter, which allowed for a research process known as 'triangulation.' Webley has explained that 'the use of different data sources collected using a range of research methods assists in reducing the possibility that the research will lead to misleading findings based on an incomplete picture.'³³⁸ These documents provided background information on both the offending and the effect that the offending had on the victim, allowing the interview to complete an otherwise 'incomplete picture.' Secondly, possession of the documents ensured that the interviewer was fully informed of the circumstances of the offending prior to the interview, which obviated the need to ask for any information on that subject from the victim participants.

E Recruiting Victim Participants

Victim participants were recruited with the assistance of victim support and witness assistance workers from various agencies. Each agency was contacted to discuss the research and ascertain if they would have the capacity and interest to assist in identifying potential participants. The agencies were also asked to make available a private room in which the interviews could be conducted, to ensure that the interviews took place in a private, quiet environment that was familiar to the victim participant. Each agency was also asked to make available a support worker during the interview, if requested by the victim participant. Arrangements were made with at least one agency in each research jurisdiction to provide the required assistance, namely Victim Support ACT, Yarrow Place Rape and Sexual Assault Service in South Australia, the Witness Assistance

³³⁸ Webley, above n 315, 940.

Service and Victim Support Services in Tasmania, and the Centres Against Sexual Assault (CASA) in Victoria.

Despite the commitment of each agency, a number of difficulties arose in recruiting victim participants. These difficulties stemmed from the strict inclusion criteria. The strict criteria were designed to protect victim participants, but consequently limited the number of potential interview participants who could be identified by the victim services agencies.

Unfortunately, the strict criteria prevented the recruitment of any victim participants in Victoria. The assisting agency, CASA, were unable to locate potential participants who had received a copy of the sentencing remarks from their case. It is not the practice of any CASA to obtain a copy of the remarks relating to the victims they counsel. Nor is it normal practice for the Office of the Director of Public Prosecutions in Victoria to provide victims with a copy of the remarks, unlike in Tasmania and South Australia, where this is standard practice.³³⁹ Furthermore, a large number of sentencing remarks in Victoria are not published online, which prevented easy access to the transcripts from alternative sources.³⁴⁰

It emerged that it was also not possible to arrange interviews with victim participants from the ACT. Victim Support ACT advised that this was because adult victims of sexual offending do not tend to remain in the ACT following a criminal trial. This situation was also mentioned in two cases from the ACT sentencing remarks dataset, *Joyce*³⁴¹ and *SP*.³⁴² While Victim Support ACT

³³⁹ Witness assistance officers from South Australia, Tasmania and Victoria confirmed these practices during the course of their interviews.

³⁴⁰ See Appendix 3, which outlines sentencing remark availability across Australia.

³⁴¹ (Unreported, ACTSC, Penfold J, 5 February 2014): '[H]er need for family support ... caused her to give up her job in Canberra and move back to the New South Wales south coast, giving up a promising career in Canberra and having to take a less well-paid job in a smaller town.'

³⁴² [2015] ACTSC 121 [21] (Walmsley AJ): '[T]he offences have had a profound affect [sic] on the complainant and her family. She has been obliged to leave Canberra and live in Sydney, away from the comfort of her obviously caring family.'

offered to recruit interstate victims for telephone interviews, it was decided that this would not be appropriate. The interview design required that interviews be undertaken with the option of the presence of a victim support worker, which would have been very difficult to arrange with an interstate telephone interview.

Consequently, victim interviews were able to be conducted only in South Australia and Tasmania, and thus only six victim interviews were undertaken in total. To supplement the data collection, 15 justice professionals were interviewed across the four research jurisdictions, resulting in 21 interviews in total.

F Recruiting Justice Professionals

Justice professional participants were recruited through direct contact with the agencies for which they worked. Senior managers from each agency were contacted by telephone and asked to seek expressions of interest from staff willing to participate in the research. Interviews were sought with:

- Prosecutors, who work with victims in the conduct of the prosecution of defendants;
- Witness assistance officers, who work to support victims from within a prosecuting agency; and
- Victim support workers, who work to support victims, but who do not work for a prosecuting agency.

In the ACT, interviews were undertaken with one senior victim support worker from Victim Support ACT and one senior prosecutor from the ACT DPP. In South Australia, interviews were undertaken with one senior victim support worker from rape crisis centre Yarrow Place, and one senior witness assistance officer from the DPP. In Tasmania, interviews were undertaken with one senior and one junior witness assistance officer, one senior prosecutor from the DPP, and one senior victim support officer from Victim Support Services Tasmania. In Victoria, interviews were undertaken with two witness assistance officers and one senior prosecutor from the specialist Sex Offence Prosecutions team at the OPP. Interviews were also undertaken with

four victim support workers of varying levels of seniority who worked at different CASAs.

Table 4.1: Interview Participants

Name³⁴³	Jurisdiction	Role
Jacqui	ACT	Prosecutor
Suzanna	ACT	Victim Support Officer
Samuel	South Australia	Witness Assistance Officer
Cathy	South Australia	Victim Support Officer
August	South Australia	Victim
Laura	South Australia	Victim
Philippa	South Australia	Victim
Jessica	South Australia	Victim
Michael	Tasmania	Prosecutor
Robert	Tasmania	Witness Assistance Officer
Harriet	Tasmania	Witness Assistance Officer
Clare	Tasmania	Victim Support Officer
Emily	Tasmania	Victim
Eve	Tasmania	Victim
Rose	Victoria	Prosecutor
Hannah	Victoria	Witness Assistance Officer
Andie	Victoria	Witness Assistance Officer
Colette	Victoria	Victim Support Officer
Jane	Victoria	Victim Support Officer
Trish	Victoria	Victim Support Officer
Alisa	Victoria	Victim Support Officer

³⁴³ Each interview participant was allocated a pseudonym to protect their anonymity. The listed name is their pseudonym.

G Conducting the Interviews

Nine of the justice professional interviews were undertaken in person, at the offices of the participants. The other six interviews were undertaken by telephone because the participants were located in regional areas. All of the victim interviews took place at the office of their support agency. As mentioned above, this was to ensure that the interviews took place in a private, quiet environment that was familiar to the victim participant. It further ensured that each victim's support worker could be available and nearby if support was needed. Three victim participants took up the opportunity to have their support worker present during the interview, while the other three did not.

The interviews were semi-structured. They each covered set areas, but the semi-structured nature allowed the participants to speak freely on issues outside those areas. In accordance with the first research aim of the thesis, victim participants were asked about their experience of completing and presenting a victim impact statement, and about their experience of the process of viewing or participating in a sentencing hearing.³⁴⁴ This included discussion of the support they received from various agencies prior to and during the court hearing. In accordance with the second research aim, they were also asked to share their feelings about the way they were acknowledged by the judge in court.

As mentioned above in subsection D, all victims were asked to provide a copy of their victim impact statement before the interview. If they no longer had a copy, they were asked for permission for a copy to be obtained from their support worker. The sentencing remarks for each case were also obtained prior to the interview, which ensured that the interviewer was aware of the circumstances of the offending, and allowed the interviews to focus on the victim impact statement and sentencing processes only, unless the participant chose to share information about the offending of their own volition.

³⁴⁴ See Appendix 8, which contains the victim interview schedule.

Justice professionals were asked thematically similar questions.³⁴⁵ In accordance with the first research aim of the thesis, these questions included the type of support that they provide to victims prior to and during trial, and their opinions on the effectiveness of the current impact statement processes. In accordance with the second research aim, the justice professionals were also asked about their views on how victims tend to be acknowledged by judicial officers in the courtroom.

The interviews began in September 2015 and were completed in June 2016. As they progressed, it became increasingly evident from the victim interviews that there were pervasive problems around the receipt of information arising in each victim's case. Because of these problems, which are explored in Chapter 7, the interview questions were refined in early 2016 to add a discussion in the victim interviews about receipt of information during the criminal process, and in the justice professional interviews, of their provision of information.

All of the interviews were audio-recorded. Each was transcribed by the interviewer, and transcripts were emailed to the interview participants for approval prior to analysis. All transcripts and coding outputs have been stored on password-protected computers.

V INTERVIEW ANALYSIS

A The Interview Transcripts

The interviews ranged in length from 17 minutes, to 1 hour and 45 minutes, with an average length of 48 minutes. The transcripts totalled 91,735 words and 189 pages.

B Coding the Interview Transcripts

The interview transcripts were imported into and systematically coded using the qualitative analysis software NVIVO (Version 11). As previously noted, coding is

³⁴⁵ See Appendix 9, which contains the justice professional interview schedule.

a process of sorting data that involves attaching labels to sections of text that identify what the sections are about.³⁴⁶ The coded text can then be isolated and examined for thematic similarities and differences. The interview transcripts were analysed in a process that involved 'coding, querying, modifying node structures, and exploring relationships'³⁴⁷ to engage with and identify the thematic content of the interviews.

The coding scheme arose iteratively from content of the transcripts and was largely guided by the questions asked of the interview subjects. In total, 19 distinct themes were identified across the interviews, which were organised chronologically by head node and alphabetically by sub-node:

- Pre-sentencing
 - Amending or editing the victim impact statement
 - Contact between victim and support service prior to trial
 - Information given to victims about the impact statement process
 - Preparing the victim impact statement
 - Recommending that victims submit an impact statement
 - Why victims might choose not to complete a statement
- At sentencing
 - Attending court
 - Cross-examination on victim impact statements
 - Information given to victims about the court process
 - Judicial acknowledgment of the victim/statement
 - Media reporting of the hearing
 - Mitigating factors in sentencing
 - Presentation of victim impact statements to the court
 - Vulnerable witness provisions
- Post-sentencing
 - Assessment of current overall system
 - Benefits of completing a victim impact statement

³⁴⁶ Charmaz, above n 317, 3.

³⁴⁷ James A Bernauer et al, 'Blending the Old and the New: Qualitative Data Analysis as Critical Thinking and Using NVivo with a Generic Approach' (2013) 18(31) *The Qualitative Report* 1, 9.

- Receipt of sentencing remarks
- Recommendations for systemic change
- Value of victim involvement in the criminal justice system

Table 4.2 contains an example of material coded under the first listed sub-node.

Table 4.2: Example of Content Coded in the Interview Analysis

Sub-node	Interview Participant	Coded text
Amending or editing the victim impact statement	Jane	<p>I remember a client who did an amazing victim impact statement, and she had drawn a picture of a rose that was a bud opening to a flower in the background of the paper. She was told she wasn't allowed to do that. That was devastating for her. We actually went into bat for that. But with the new process, I haven't had anyone come back and say that they weren't allowed to say something, or weren't allowed to present something.</p> <p>In the last couple of years, there has been a change with victim impact statements. They have become less rigid. There used to be a lot of clients who had been distraught because they had written their statements but had to change them because the rules said that they didn't look right. But in the last two or three years, I haven't had anyone come back and say that they had to change what they wrote.</p>

The coded themes guided the analysis of the interviews contained in Chapters 6 and 7.

VI SENTENCING REMARKS ANALYSIS

A The Sentencing Remarks

The sentencing remarks for every sexual offence conviction involving both an adult victim and adult offender in the ACT (n = 22), South Australia (n = 22) and Tasmania (n = 16) between 2014 and 2016 were examined.³⁴⁸ Victoria had a far greater number of published remarks than the other jurisdictions, which reflects

³⁴⁸ See Appendix 2 for a full table of cases.

that state's significantly larger population. Consequently, a random selection of Victorian remarks published between 2014 and 2016 were collected (n = 40).

In all, sentencing remarks from 100 cases from the four jurisdictions were collected and analysed. The ACT cases involved eight individual sentencing judges; the South Australian cases involved 14 judges, the Tasmanian cases, five judges, and the Victorian cases, 21 judges. In 66 cases, sentences were imposed following pleas of guilty, while in 33, sentencing occurred after findings of guilt following trial. In one case there was a combination of both plea and guilty verdict.

The length of the remarks ranged from 467 words to 8,705 words, with an average length of 2,906 words. The remarks in South Australia and Tasmania were generally much shorter, with an average length of 1,849 and 1,966 words respectively. In the ACT and Victoria, the remarks tended to be longer, with an average length of 3,195 words in the ACT and 3,703 words in Victoria.

The following table displays the type of offending dealt with in each set of remarks. Only the most serious offence for which the offender was convicted is listed. For example, if the offender was convicted of both rape and indecent assault, the matter is listed under the category of rape.

Table 4.3: Convicted Offences by Jurisdiction

Most serious offence	ACT	SA	TAS	VIC	Total
Rape ³⁴⁹	15	15	10	26	66
Attempted rape	0	1	0	1	2
Aggravated sexual assault	0	0	4	0	4

³⁴⁹ The offence of sexual intercourse with a person who does not consent is called 'sexual intercourse without consent' in the ACT under the *Crimes Act 1900* (ACT) s 55, 'rape' in South Australia under *Criminal Law Consolidation Act 1935* (SA) s 48, 'rape' under *Criminal Code Act 1924* (Tas) Schedule 1 s 335, and 'rape' under *Crimes Act 1958* (Vic) s 58. To achieve consistency, the term 'rape' is used to describe this category of offending across all of the jurisdictions.

Most serious offence	ACT	SA	TAS	VIC	Total
Sexual penetration by fraud	0	0	0	2	2
Indecent assault	7	5	2	11	25
Indecent filming	0	1	0	0	1
Total	22	22	16	40	100

The remarks from each jurisdiction tended to follow the same general format, starting with a description of the course of the offending. This was often, though not always, followed by a description of the effect of the crime on victim and/or his or her family or community. Then the offender's personal circumstances were described, including their previous criminal history, before the remarks finished with the sentence imposed. The remarks from the ACT, South Australia and Victoria all appear to be complete records of the sentencing hearing from the time the judge commenced the remarks, including dialogue between the judicial officer and the offender and/or their representative. The published Tasmanian remarks record only the words spoken by the judge.

B Coding the Sentencing Remarks

As with the interview transcripts, the sentencing remark transcripts were systematically coded using NVIVO (Version 11). The focus when coding the remarks was on determining frequency, ie how many cases involved judicial reference to victim harm, and substance, ie the extent to which victim harm was or was not discussed.

Text was coded when the judicial officer made reference to a victim's impact statement — or mentioned a lack thereof — and/or to the harm experienced by the victim and/or their family. This included judicial reference to harm that was actually suffered, or harm that could foreseeably be suffered as a consequence of the offending. The coding rule excluded mention of the victim if the reference was merely to explain the circumstances of the crime, for example when the judicial officer outlined the facts of the crime without mentioning the harm

caused. Table 4.4 contains an example of coding from one of the cases in the dataset.

Table 4.4: Example of Content Coded in the Sentencing Remarks Analysis

Case	Coded text
<i>R v Guerra</i> (Unreported, TASSC 25 September 2014)	<p>The indecent assault had a serious impact on the complainant's wellbeing. She no longer feels safe and is unable to trust people. She fears she will have to abandon her desire to travel overseas independently.</p> <p>This offending is serious. It has had serious consequences for its victim and the defendant preyed on the complainant's vulnerability given the age difference between the two and the fact that the complainant was living in the defendant's hostel because she was estranged from her family, as was known to the defendant.</p>

The remarks were coded for 'manifest' content, which is the 'visible surface content' of the text, rather than 'latent' content, which is the possible 'underlying meaning' of the text.³⁵⁰ This approach was taken because this thesis explores the effect that judicial comments at sentencing have on victims, who are likely to take the remarks at face value. Coding for manifest content also involves a significantly 'lower degree of interpretation.'³⁵¹ This reduces the subjectivity of any results.³⁵² The analysis of the sentencing remarks is contained in Chapter 5.

VII LIMITATIONS OF THE RESEARCH

There are a number of limitations to the research, which are largely due to the small and exploratory nature of the study, and the strict inclusion criteria for victim participants. First, the number of interviews undertaken for the research

³⁵⁰ Michael G Maxfield and Earl R Babbie, *Research Methods for Criminal Justice and Criminology* (Cengage Learning, 7th ed, 2015) 348-349.

³⁵¹ *Ibid.*

³⁵² Nevertheless, it must be acknowledged that coding can still be inherently subjective. Accordingly, the results of the coding undertaken for this thesis may be different to the results arising from coding of the same dataset by a different researcher.

was small (n = 21), though this is still consistent with current research practice. Green and Thorogood state that ‘the experience of most qualitative researchers is that in interview studies little that is “new” comes out of transcripts after you have interviewed 20 or so people.’³⁵³ Further, Guest, Bunce and Johnson state that 15 is the smallest acceptable sample.³⁵⁴ It was certainly found that upon interviewing 15 justice professionals, saturation was reached as new categories, themes and explanations stopped emerging from the data.³⁵⁵ However, as noted above, the six victim interviews were fewer than originally planned, and this small number cannot be seen as representative of all victims of sexual offending who complete impact statements. Future research would certainly benefit from interviews with an increased number of victim participants. It is further recognised that, because the justice professional interviewees were self-selected, this also limits the representativeness and consequent generalisability of the interview findings arising from this cohort of participants.³⁵⁶

Secondly, while this thesis examines judicial use of impact statements at sentencing by analysing transcripts from a sample of sentencing hearings, copies of the impact statement(s) from those sentencing hearings were not obtained. While each court has full discretion in choosing whether or not to release such documents to the public,³⁵⁷ potential difficulties could have arisen in accessing the statements, due to concerns for the privacy of the victims who drafted them. This is particularly so because this research examines such a sensitive category of offending. This does not prevent critique of the way that judges used and

³⁵³ Judith Green and Nicki Thorogood, *Qualitative Methods for Health Research* (SAGE, 2nd ed, 2009) 103.

³⁵⁴ Greg Guest, Arwen Bunce and Laura Johnson, ‘How Many Interviews Are Enough? An Experiment with Data Saturation and Variability’ (2006) 18(1) *Field Methods* 59.

³⁵⁵ Martin N Marshall, ‘Sampling for Qualitative Research’ (1996) 13(6) *Family Practice* 522, 523.

³⁵⁶ Bruce Tranter, ‘Sampling’ in Maggie Walter (ed), *Social Research Methods* (Oxford University Press, 3rd ed, 2013).

³⁵⁷ See, eg, *Court Procedures Rules 2006* (ACT) Rule 4053; *District Court Act 1991* (SA) s 54(2); *Supreme Court Act 1935* (SA) s 131(2); County Court of Victoria, *Accessing Court Documents and Data* <<https://www.countycourt.vic.gov.au/accessing-court-documents>>.

referred to the impact statements at sentencing, but it does mean that certain aspects of the critique are speculative in nature.

Similarly, financial and time constraints prevented the transcript analysis from being supplemented by the context that could have been provided by interviewing at least some of the judicial officers whose remarks were analysed. The views of judicial officers on barriers they may encounter in incorporating victim acknowledgment into their sentencing remarks would add an additional layer of depth to any future research on this topic.

Fourthly, also due to resource constraints, only four of the eight Australian jurisdictions were researched for this thesis. While attempts were made to identify best practice across the ACT, South Australia, Tasmania, and Victoria, it is quite possible that beneficial practices go unacknowledged in NSW, the Northern Territory, Queensland, or Western Australia.

Finally, as mentioned above, in conducting the victim interviews, it quickly became apparent that there were pervasive problems around the lack of information received by each victim. However, by the time that victim interviews had commenced and this problem had emerged, a large number of justice professional interviews had already been completed. Consequently, there were a number of interviewees who were not asked about this subject. Accordingly, this thesis is unable to represent the views of all of the interviewed justice professionals throughout the discussion of victims' right to information in Chapter 7.

VIII CONCLUSION

Subject to the limitations noted in Section VII, the chosen research approaches were well suited to obtain valuable insight, and to achieve the primary aims of this thesis. The content analysis of sentencing remarks allowed for an in-depth critique to be undertaken of current judicial practice in acknowledging victims at sentencing. Undertaking interviews with victims and with justice professionals

has allowed for a rich analysis of victim experiences from multiple perspectives, and the benefits of directly interviewing victim participants greatly outweighed the difficulties encountered in planning and conducting this component of the research.

The thesis next discusses the findings from the data collected. Chapter 5 contains the analysis of transcripts of judicial remarks when passing sentencing, while the findings from the interviews are explored in Chapters 6 and 7.

CHAPTER 5:

JUDICIAL USE OF VICTIM IMPACT STATEMENTS IN SENTENCING: A CRITIQUE OF CURRENT PRACTICE

I	Introduction	92
II	The Wider Sentencing Context	95
III	Benefits of Judicial Acknowledgment	96
	A <i>Benefits to Victims</i>	96
	B <i>Benefits to Others</i>	97
IV	Content Analysis Findings	98
	A <i>Problems Arising from Minimal Reference to Victim Harm</i>	99
	B <i>The Challenge of Quantifying Therapeutically Effective Levels of Victim Acknowledgment</i>	102
	1 <i>Examples of Victim Satisfaction</i>	103
	2 <i>Examples of Victim Dissatisfaction</i>	110
	C <i>Cases with No Impact Statement Submitted</i>	114
	D <i>Judicial Reference to Instrumental and Expressive Purposes of Statements</i> ..	116
V	Educating Judges on the Therapeutic Outcomes of Acknowledging Victims at Sentencing	117
	A <i>Recommendation 1: The Publication of a Victim-Focused Benchbook</i>	117
	B <i>Recommendation 2: The Introduction of Victim-Focused Pre-Sentencing Hearings</i>	118
VI	Conclusion	119

I INTRODUCTION

When sentencing, judges speak to offenders, to victims and their supporters, and to the public at large about right and wrong conduct.³⁵⁸ This makes sentencing a tool for communication between the criminal justice system and society.³⁵⁹

³⁵⁸ Kate Warner, 'Sentencing in Cases of Marital Rape: Towards Changing the Male Imagination' (2000) 20(4) *Legal Studies* 592, 594; Kathleen Daly and Brigitte Bouhours, 'Judicial Censure and Moral Communication to Youth Sex Offenders' (2008) 25(3) *Justice Quarterly* 498, 502.

³⁵⁹ Geraldine Mackenzie, *How Judges Sentence* (Federation Press, 2005) 27.

Sentencing regimes in Australia³⁶⁰ require that judges use this tool to acknowledge victims, and in doing so, recognise the harm caused by the offending at an individual and personal level.³⁶¹ Research has shown that this acknowledgment can be validating and therapeutically beneficial for victims,³⁶² especially when judicial officers refer to ‘specifics from [victim impact statements] when handing down the sentence.’³⁶³ It is arguable that judges must, at least in some Australian jurisdictions, consider these therapeutic outcomes of sentencing upon victims, not only because of the legislative requirement to recognise the harm caused to victims as a consequence of the offending,³⁶⁴ but also because of a variety of legislative instruments,³⁶⁵ case law,³⁶⁶ and policies.³⁶⁷ Accordingly, sentencing remarks are ‘important and consequential speech acts,’³⁶⁸ because they allow judicial officers to facilitate what Vincent JA has described as the ‘social rehabilitation’ of the victim.³⁶⁹

Emerging research suggests that judicial officers are aware of the therapeutic benefits of acknowledging victims, with 97 per cent of recently surveyed

³⁶⁰ For example, see *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g); *Sentencing Act 1997* (Tas) s 3(h); *Criminal Law (Sentencing) Act 1988* (SA) ss 10(1)(d) - 10(1)(e); *Sentencing Act 1991* (Vic) s 5(2AC)(2).

³⁶¹ Roberts and Manikis, above n 92, 27.

³⁶² Erez, above n 92, Michael S King, ‘The Therapeutic Dimension of Judging: The Example of Sentencing’ (2006) 16 *Journal of Judicial Administration* 92, 101.

³⁶³ Schuster and Prosen, above n 194, 24.

³⁶⁴ It should be noted that this thesis does not argue that judges should impose sentences for the purpose of facilitating therapeutic outcomes for victims. Instead, it argues that it is possible to shape the process in which the sentence is imposed so as to collaterally benefit victims. This this requires no express statutory authority, because it is not inconsistent with, nor does it detract from, the purposes of sentencing.

³⁶⁵ For example, *Sentencing Act 1997* (Tas) s 3(h); *Victims of Crime Assistance Act 2009* (Qld) s 15(4).

³⁶⁶ For example, *DPP v DJK* [2003] VSCA 109; *R v Leach* [2003] SASC 92.

³⁶⁷ For example, Western Australian Country Magistrates’ Resolution on Therapeutic Jurisprudence: Michael S King and Kate Auty, ‘Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction’ (2006) 30(2) *Alternative Law Journal* 69.

³⁶⁸ Daly and Bouhours, above n 358, 502.

³⁶⁹ *DPP v DJK* [2003] VSCA 109 [17]-[18] (Vincent JA). See also *DPP v Toomey* [2006] VSCA 90, [21]-[22] (Vincent JA); *DPP v Bayley* [2015] VCC 698 [85] (Pullen J); *DPP v McLachlan* [2015] VCC 1164 (Howard J).

Victorian judges reporting that they would always refer to an impact statement in their reasons for sentence,³⁷⁰ and all recently surveyed South Australian judges reporting that they often or almost always refer to impact statements in their sentencing remarks.³⁷¹ Yet actual judicial practice in relation to the use of impact statements at sentencing has very rarely been empirically researched, and no research currently quantifies judicial acknowledgment of victims at sentencing, in Australia or elsewhere.³⁷²

This Chapter begins to fill that knowledge gap by presenting a content analysis of sentencing remarks from 100 sexual offence cases from the ACT, South Australia, Tasmania and Victoria between 2014 and 2016. This analysis was designed to fulfil one of the major research aims of this thesis, namely to explore judicial practice in relation to the use of and reference to victim impact statements at sentencing in sexual offence cases. The Chapter identifies both how and how often judicial officers refer to victims and their impact statements at sentencing, and explores how different judicial approaches can affect the victims involved.³⁷³

³⁷⁰ Victorian Department of Justice, above n 172, 58.

³⁷¹ O'Connell, above n 31.

³⁷² Content analysis of sentencing remarks is an emerging field. See, for example, Brigitte Bouhours and Kathleen Daly, 'Youth Sex Offenders in Court: An Analysis of Judicial Sentencing Remarks' (2007) 9 *Punishment and Society* 371; Lorana Bartels, 'To Suspend or Not to Suspend: A Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania' (2009) 28(1) *University of Tasmania Law Review* 23; Samantha Jeffries and Christine E W Bond, 'Narratives of Mitigation: Sentencing Indigenous Criminal Defendants in South Australia's Higher Courts' (2010) 46(3) *Journal of Sociology* 219; Rosemary Hunter and Danielle Tyson, 'Justice Betty King: A Study of Feminist Judging in Action' (2017) 40(2) *University of New South Wales Law Journal* 778; Jordan Tutton, 'Therapeutic Jurisprudence in Sentencing Remarks: An Exploratory Study' (2017) 42(2) *Alternative Law Journal* 162; Kate Warner, Julia Davis and Helen Cockburn, 'The Purposes of Punishment: How Do Judges Apply a Legislative Statement of Sentencing Purposes?' (2017) 41 *Criminal Law Journal* 69.

³⁷³ A limitation of this analysis was identified in Chapter 4. It was explained that copies of submitted impact statements were not sought for the analysed sentencing transcripts. This was because of the difficulties that could arise in acquiring the statements from the court, due to privacy concerns for the victims. Accordingly, it is impossible to estimate the content or length of any statement submitted at a hearing, except where the judge has quoted directly from it. Yet, without knowing the exact contents of each statement, it is still possible to discuss and critique the extent to which judges acknowledge victims within their remarks.

The Chapter begins by identifying the context within which judges operate when sentencing offenders. It then uses the interview findings to explore the therapeutic benefits that victims may derive from judicial acknowledgment at sentencing. Next, the findings of the content analysis are discussed. This analysis is also informed by the interview findings, and by previous research about victims' justice needs. It uses excerpts from the original dataset to illustrate and critique current judicial practice, and to identify practices that may be therapeutic or anti-therapeutic from a victim-focused perspective. Finally, the Chapter makes recommendations for a number of educative and legal processes to help judicial officers develop an understanding of how to effectively and therapeutically acknowledge victims when sentencing.

II THE WIDER SENTENCING CONTEXT

While this Chapter focuses on victim perspectives of judicial acknowledgment at sentencing, it would be remiss not to mention the wider sentencing context, including the parameters within which judicial officers must work.³⁷⁴ Despite recognition and/or consideration of the victim being specifically required by sentencing legislation around the country,³⁷⁵ this recognition does not minimise the main objectives of sentencing, which include deterrence, protection of the community, 'just' or 'adequate' punishment, denunciation, and rehabilitation.³⁷⁶ Accordingly, it is recognised that when preparing their sentencing remarks, judges are required to balance these numerous purposes of sentencing. However, because a therapeutic jurisprudence approach encourages judges to consider not only 'the substantive law and procedure, but ... the way in which

³⁷⁴ See Sharyn Roach Anleu, Russell Brewer and Kathy Mack, 'Locating the Judge within Sentencing Research' (2017) 6(2) *International Journal for Crime, Justice and Social Democracy* 46.

³⁷⁵ *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g); *Sentencing Act 1995* (NT) s 5(2)(b); *Penalties and Sentences Act 1992* (Qld) s 9(2)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 10(d); *Sentencing Act 1997* (Tas) s 3(h); *Sentencing Act 1991* (Vic) s 5(2)(d); *Sentencing Act 1995* (WA) s 6(2)(b).

³⁷⁶ *Crimes (Sentencing) Act 2005* (ACT) s 7(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(1); *Sentencing Act 1995* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9(1); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1) *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) ss 1(d), 5(1); *Sentencing Act 1995* (WA) s 6(4).

they interact with people in court and the potential impact of their actions on the wellbeing of those affected by them,³⁷⁷ this Chapter encourages judicial officers to consistently consider the effect of their sentencing remarks on victims.

III BENEFITS OF JUDICIAL ACKNOWLEDGMENT

A Benefits to Victims

As detailed in Chapter 1, the justice needs of victims of sexual offending include the need for voice and participation.³⁷⁸ The right to present an impact statement should fulfil those two needs, at least to some extent. There are several further justice needs that could possibly be met by effective judicial acknowledgment of victims and their impact statements at sentencing. These include victims' need to be treated with respect,³⁷⁹ their need for validation, involving affirmation that they are believed,³⁸⁰ and their need for vindication, involving recognition that what has happened to them was wrong.³⁸¹

The justice professionals interviewed for this thesis overwhelmingly agreed that victims can derive therapeutic benefits from judicial acknowledgment at sentencing. They identified several ways that victims' justice needs can be met by this acknowledgment. Two witness assistance officers explained how a victim's need for respect and voice, including public recognition and acknowledgment, can be met by the judge during sentencing:

In the end, to have the judge say 'before you sit down, I just want to say to you that it's amazing that you just read out your victim impact statement and I admire your strength,' or to have it acknowledged in sentencing remarks is so powerful. People comment on that, and you see them emotionally and physically react to it. Just to have the judge look them in the eye, and say 'I acknowledge your experience', it's so great for them. (Andie, Witness Assistance Officer, VIC)

³⁷⁷ King, above n 362, 93.

³⁷⁸ Shapland, Willmore and Duff, above n 17; Lievore, above n 18.

³⁷⁹ McGlynn, above n 22.

³⁸⁰ Bluett-Boyd and Fileborn, above n 19; Clark, above n 21.

³⁸¹ Herman, above n 9.

It absolutely changes their lives. There's a really obvious sense of relief when they are referred to in the comments. I think there's nothing that gives a victim more closure than hearing a judge say 'I've heard what you've had to say about it.' (Harriet, Witness Assistance Officer, TAS)

Two victim support workers also described how a victim's need for respect and validation can be met when a judge's acknowledgment demonstrates that the victim has been believed by the court:

That acknowledgment is very powerful for the victim and really makes a difference. It's that validation. It's about humanising them. I remember a client who said, 'he really did read it, and he got it'. It was about feeling understood, and heard, and believed, and valued. (Jane, Victim Support Officer, VIC)

It is absolutely an empowering experience to see people come out the other side of [sentencing] and feel heard. They are often acknowledged by the presiding judge in very respectful ways, which is very validating and very satisfying for people ... in the matters I've been involved with, victims have been quoted [by the judge]. So they do know that they have been read and taken notice of ... it's profound. (Cathy, Victim Support Officer, SA)

Accordingly, the interviews conducted for this thesis confirm the significant beneficial and therapeutic effect that judicial acknowledgment can have for victims, and demonstrate that a range of victims' justice needs can be met by this acknowledgment at sentencing.

B Benefits to Others

The benefits of judicial acknowledgment arguably extend beyond individual victims. They may extend to victims' families or supporters, because judicial acknowledgment of harm may provide validation to those who have supported victims throughout their victimisation experience. Acknowledgment of harm can also benefit victims' families or supporters, insofar as they may not otherwise have understood the harm experienced by their friend or family member.³⁸² This

³⁸² See Miller, above n 6, 1445.

may assist them to provide victims with ongoing support.

The acknowledgment may also benefit the wider community, by educating them about the harm caused by the offending. Judicial acknowledgment of victims may also provide an opportunity for offenders to comprehend the harm caused by their offending. This may promote their rehabilitation, by changing their views about crime, or their future choices in relation to offending behaviour.³⁸³ Accordingly, judicial acknowledgment of victim harm should be encouraged, not only because of the potential for beneficial outcomes for victims, but also for the potential for beneficial outcomes for offenders and the wider community.

IV CONTENT ANALYSIS FINDINGS

In the analysed dataset, impact statements were submitted in at least 79 of the 100 cases. Victims and/or their impact statements were acknowledged by judicial officers in 95 cases, with harm to victims' families also mentioned in 15 cases.³⁸⁴ As shown in Table 5.1 below, Victoria is the only jurisdiction where the judge acknowledged the victim in all cases. In the ACT, judges did not acknowledge victims in three of the 22 cases, in contrast to one case each in South Australia and Tasmania. In other words, harm to victims and/or their families was mentioned in 100 per cent of cases in Victoria, 95 per cent of cases in South Australia, 94 per cent of cases in Tasmania, and 86 per cent of cases in the ACT. This is consistent with the Victorian and South Australian judges' survey answers outlined in Section I above, and with Booth's recent review of 'sentencing judgements more broadly across Australian jurisdictions [which] reveals it is rare for a sentencing judge not to refer to VISs.'³⁸⁵

³⁸³ Booth, above n 96, 59; Hill, above n 128; Shapland and Hall, above n 128; White and Perrone, above n 128, 119.

³⁸⁴ For a breakdown of acknowledgment of harm across cases, see the Table of Case Characteristics in Appendix 2.

³⁸⁵ Booth, above n 92, 150.

Table 5.1: Harm Acknowledged by Jurisdiction

Harm Acknowledged in Sentencing Remarks	ACT (n = 22)	SA (n = 22)	TAS (n = 16)	VIC (n = 40)	Total (n = 100)
Harm to the victim	19	21	15	40	95
Harm to the victim's family	4	2	3	6	15
No mention of harm	3	1	1	0	5

As illustrated by the Table of Case Characteristics in Appendix 2, the degree of acknowledgment varied greatly across cases, showing no discernible pattern according to the nature or seriousness of the offence.³⁸⁶ There was no evident difference between matters resolved by plea or at trial. There were also no obvious differences in victim acknowledgment on the basis of whether there was a prior relationship between the offender and the victim.

In all jurisdictions, there were examples of judicial acknowledgment that can be understood as either therapeutic or anti-therapeutic from a victim-focused perspective. The next subsection identifies judicial practices that clearly fail to meet the justice needs of victims as identified by Section III above. The following subsection then explores the significant difficulties that judicial officers may face when attempting to craft therapeutically effective sentencing remarks.

A Problems Arising from Minimal Reference to Victim Harm

It would appear that the ideal extent to which judicial officers should refer to or acknowledge victims when sentencing has never been definitively identified. However, the Victorian Victim Support Agency found in its 2014 research that victim support and witness assistance officers spoke highly of judges who acknowledged the victim in detail,³⁸⁷ in contrast to those who provided minimal

³⁸⁶ That is to say, judges did not tend to devote a greater proportion of their sentencing remarks to victim harm in more serious cases such as rape, in comparison to less serious cases such as indecent assault.

³⁸⁷ Victorian Department of Justice, above n 172. 59.

acknowledgment, with a one-sentence reference described as ‘tokenistic.’³⁸⁸ The justice professionals interviewed for the current research agreed that the extent of judicial acknowledgment varies between cases. They similarly identified acknowledgment consisting of a mere sentence as problematic:

They are all different. Some are really good and will go into a lot of detail about what a victim has said in their victim impact statement ... Others will just say that they have read the victim impact statement and taken it into account. (Hannah, Witness Assistance Officer, VIC)

[Sometimes] they just say ‘I have taken into account the victim impact statement and I note that as a consequence of your offending, the victim has suffered.’ That’s about the minimum that I have found. (Rose, Prosecutor, VIC)

I think sometimes, unfortunately, [the acknowledgment] can fall flat. And the process can feel somewhat tokenistic. A bit like box ticking in terms of hearing from the victim. (Trish, Victim Support Officer, VIC)

There have been some examples where the victim didn’t feel like they were taken seriously. That has huge ramifications on the victim. (Suzanna, Victim Support Officer, ACT)

Six instances of such ‘tokenistic’ references were found in remarks from all jurisdictions in the dataset. Impact statements had been submitted in five of the six cases. The cases differed in terms of offence type and severity. Half were stranger assaults, while the other half of the offenders were well known to their victims.

In the Victorian case of *DPP v Johns*,³⁸⁹ the judge stated ‘[the victim] read her victim impact statement in court, and I have taken that into account.’ With equal brevity, in *R v Kim*,³⁹⁰ a judge of the ACT Supreme Court said ‘these offences, of course, involved a gross invasion of the privacy of your victims.’ In a South

³⁸⁸ Ibid.

³⁸⁹ [2015] VCC 840 [7].

³⁹⁰ [2015] ACTSC 182 [12].

Australian case, *R v Pelly*,³⁹¹ the judge said 'you would have noticed from the victim impact statement the traumatic consequences for her.' Comparably, in *R v Duncan*,³⁹² the same judge noted 'as you heard from the victims, [the offending was] quite alarming and devastating.' In a slightly longer comment in *R v Naiker*,³⁹³ another judge of the South Australian District Court stated that '[the victim] was shocked by what happened and has understandably suffered and been mentally and emotionally affected by your offending.' Similarly, in *R v PB*,³⁹⁴ a judge of the Tasmanian Supreme Court said '[the victim] has provided a victim impact statement. It was a very upsetting time for her, and she is still anxious about some aspects of [the offender's] conduct.'

One South Australian victim interviewed for this study recalled that the judge made only a brief and passing reference to her when sentencing the offender. According to Laura, 'it was all part of the speech; he talked about the crime and how the offender acted, and said "based on this, this is what the sentence is." It was done really quickly.' She expressed no positive views about what was said. Her recollection is confirmed by the transcript of her case, which reveals that a single sentence was the extent of the judicial acknowledgment: 'I make it clear that I take into account the impact on the victim and those close to her of this defendant's appalling treatment of her.'³⁹⁵

The Victorian Victim Support Agency's interviews with victims indicated that the most important determinant of victims' satisfaction arising from judicial acknowledgment is whether the judicial officers made clear that they had carefully considered the victims' statements.³⁹⁶ This is consistent with victims' needs for validation and vindication. Unfortunately, the judges' fleeting

³⁹¹ (Unreported, SADC, 28 August 2014).

³⁹² *R v Duncan* (Unreported, SADC, 6 November 2014).

³⁹³ *R v Naicker* (Unreported, SADC, 10 October 2014).

³⁹⁴ (Unreported, TASSC, 7 December 2015).

³⁹⁵ The judgment in each victim's case is on file with the author. The citations for these judgments have been withheld to protect the anonymity of each victim.

³⁹⁶ Victorian Department of Justice, above n 172, 59.

acknowledgments in the cases of *Johns*,³⁹⁷ *Kim*,³⁹⁸ *Pelly*,³⁹⁹ *PB*,⁴⁰⁰ *Duncan*,⁴⁰¹ *Naicker*,⁴⁰² as well as in Laura's case, fail to convey careful consideration. This suggests that the judges in these cases either do not understand how to demonstrate their consideration of victim impact statements, or have not turned their minds sufficiently to this issue when crafting their remarks. This creates the risk, as identified by ACT Victim Support Officer Suzanna, that victims will not 'feel like they were taken seriously,' and negates the potential benefit or validation the victim might obtain from more detailed acknowledgment. It also fails to pay due respect to the effort made by victims to explain the effect of the offending on them, and creates the risk that judicial officers may be perceived to lack an understanding of the impact of sexual offending on victims, which in turn raises concerns about victims' equal treatment before the law.⁴⁰³

To resolve this problem, the following subsection explores more therapeutically effective approaches that judges can take when acknowledging victims. Drawing on this analysis, Section V below makes recommendations seeking to ensure that judicial officers are provided with comprehensive information about the possible therapeutic and anti-therapeutic consequences of their acknowledgment of victims when sentencing.

B The Challenge of Quantifying Therapeutically Effective Levels of Victim Acknowledgment

As explored in the preceding subsection, the anti-therapeutic outcomes arising from minimal judicial acknowledgment of victim harm are incontrovertible. In contrast, the sentencing remarks analysis and victim interviews reveal that it is

³⁹⁷ [2015] VCC 840.

³⁹⁸ [2015] ACTSC 182.

³⁹⁹ (Unreported, SADC, 28 August 2014).

⁴⁰⁰ (Unreported, TASSC 7 December 2015).

⁴⁰¹ (Unreported, SADC, 6 November 2014).

⁴⁰² (Unreported, SADC, 10 October 2014).

⁴⁰³ See Judicial Commission of New South Wales, *Equality Before the Law Bench Book* <<https://www.judcom.nsw.gov.au/publications/benchbks/equality/section07.html>> Section 7.3.3.2.

far more difficult to definitively identify judicial practices which are likely to have therapeutic outcomes for victims. This subsection explores this issue by first identifying the type of acknowledgment that was found to be beneficial for some of the victims interviewed. It then examines the experiences of victims who were unsatisfied, despite receiving a similar level of acknowledgment to those victims who were satisfied. The interview findings are supplemented by the analysis of the sentencing remarks dataset.

1 Examples of Victim Satisfaction

Three of the victims interviewed were extremely satisfied with the level of acknowledgment they received from the judges in their cases. The judicial officers in each case acknowledged the victims differently, but what the three cases share in common is that each judge implicitly met the justice needs of the victim, as identified in Section III above. For example, Philippa from South Australia was pleased by the following acknowledgment in her case:

The effect upon the victim over the past 23 years has been horrendous and pervasive. As the victim has described in her victim impact statement, your arrest and the recent court proceedings have forced her to relive the whole incident again. The victim had, after much suffering, learned to deal with the effect of your crimes. She developed coping mechanisms, but still the effects of your crimes were felt in every aspect of her life. When you were arrested in 2013, the victim was forced to face the ordeal again. As she so eloquently described in her victim impact statement and I quote: 'Having spent the last 20 years trying to forget, from that moment I've been required to do nothing but remember, and remember I have. I have remembered the terror whilst I tried to work out how to best survive a situation which I instinctively knew was going to end in rape, my focus being on it not ending in death.'

In this case, the sentencing judge recognised and acknowledged the harm caused to Philippa by the offending. Philippa noted in her interview that she particularly appreciated the judge's reference to the 'impact of the offence and the impact of the process' upon her. The judge then vindicated Philippa by describing the effects of the offending as 'horrendous and pervasive.' Finally, the judge validated Philippa by making clear that the court believed Philippa about the

harm caused by the offending, which was achieved through direct quotation from the impact statement.

South Australian victim August also appreciated the level of acknowledgment from the judge in her case, who validated and vindicated her by saying that it was ‘abundantly clear from [the victim’s] impact statement that [the offender’s] conduct has had a marked impact upon her ... Hopefully time will heal the emotional and psychological impact of your behaviour.’⁴⁰⁴ August appreciated that the judge ‘referred to [the impact statement] quite a bit. And indirectly talked to me a few times, saying [things] like, “she seems like a lovely young lady and strong”. It was really cool, [the judge] really listened to it.’

Emily from Tasmania was another victim who was satisfied with the acknowledgment by the judge in her case. The following remarks validated and vindicated Emily:

[The offender] has caused significant emotional and psychological harm. The harm is continuing and may be long lasting ... the vulnerability of [the victim] arising from her trust in [the offender], and the harm caused to her, must all be reflected in the sentence.

Emily felt that ‘it was good to see that what I said was taken on board.’⁴⁰⁵

A significant number of the analysed sentencing remarks (n = 23) demonstrate similar levels of judicial acknowledgment. A sample of these has been comprehensively analysed. To ensure that the remarks are understood in context, the comments from the sample cases relating to victim harm are extracted in Table 5.2, before being analysed separately below.

⁴⁰⁴ The judge spoke about August and her impact statement for one paragraph of the remarks in that case. The author has a copy of the remarks on file. However, they are also archived on a searchable website. Accordingly, they have not been fully transcribed here, so as to avoid breaching August’s anonymity.

⁴⁰⁵ The remarks in Emily’s case, like all Tasmanian remarks, are permanently available online. Accordingly, they have not been fully transcribed here, so as to avoid breaching Emily’s anonymity.

Table 5.2: Examples of Judicial Acknowledgment that Implicitly Meet Victims' Justice Needs

Case, (Jurisdiction)	Reference to victim harm
<i>R v Ballantyne</i> ⁴⁰⁶ (ACT)	The effects for the victim are the sorts of effects that the Court commonly sees in the case of victims of sexual assaults. The victim had been a confident, outgoing girl. She was described as a "natural leader". She engaged well at school ... However, immediately after the incident, she became fearful and was very reluctant to leave her home for several weeks. She dropped out of Year 12 ... She was in constant fear of encountering the offender. There was a flow-on effect to her family, who felt quite powerless in the situation ... The Court acknowledges the suffering of the victim's family and hopes that, as a consequence of the resolution of these proceedings, the victim and her family can come to terms with what has occurred and move on with their lives.
<i>R v Scrivener</i> ⁴⁰⁷ (SA)	Your victim read her very eloquent victim impact statement in court. This took great courage. I will not do her the disservice of paraphrasing what she said because I am sure you will remember what she told you about how your actions that night have affected her. You were a trusted friend staying in your victim's house. Your actions were a gross breach of that trust and that friendship. Your victim, her family and friends continue to live with the consequences.
<i>R v QMT</i> ⁴⁰⁸ (Tas)	The complainant suffered areas of tenderness and bruising, including fingertip bruises to her thighs. The emotional consequences to her have been significant. She was extremely frightened during her ordeal. She has had difficulty sleeping and suffers from nightmares. She feels scared and anxious and also experiences outbursts of anger. The courts know very well that such adverse effects are often long-lasting, affecting wellbeing, relationships and many facets of a complainant's life ... These are serious crimes that amounted to a complete breach of trust. The crime of rape was persistently carried out with complete disregard for the complainant's obvious distraught state, and her clear and determined refusal. The sentence must adequately reflect the nature of these crimes, the terrible ordeal experienced

⁴⁰⁶ (Unreported, ACTSC, 1 April 2014).

⁴⁰⁷ (Unreported, SADC, 6 June 2014).

⁴⁰⁸ (Unreported, TASSC 11 May 2015).

	by the complainant and the harm you have caused to her.
<i>DPP v Barbat</i> ⁴⁰⁹ (Vic)	I received a Victim Impact Statement from [the victim]. In it, she eloquently describes the effect of your crimes on her. You heard that read out in court and you should feel ashamed at the impact your actions have had on her and her life. She felt sheer terror at the time of the offending ... As a result of your offending, she has lost her ability to trust others, or allow others to get close to her emotionally. She has lost her innocence and bubbly personality as well as her confidence, which has reduced her circle of friends; and she feels estranged from her family. Nothing I say can make her feel safer or improve her outlook on life, and given her nightmares of seeing you out of gaol, I am conscious that the sentence I am going to impose will not seem sufficient for her. However, I assure her that I have taken the impact on her very much into account in my sentence, although it must be balanced against the other factors the law requires me to take into account. I am pleased to note that she is receiving counselling from a psychologist which is affording her some comfort and she bravely recognises that things will get better in time. I encourage her to continue to seek assistance for as long as she needs. I wish her well in the future.
<i>R v Stanley</i> ⁴¹⁰ (ACT)	The victim prepared a victim impact statement which the Crown Prosecutor read out. That can be important as it then is clear that the offender has heard what the victim has to say. It was difficult to hear that victim impact statement without experiencing some of the pain and hurt that the victim described. Courts know of the serious effects of such violence and invasions of the bodily integrity of victims but it is very valuable to hear the voices of the victims and understand how the hurt and damage can be different for each victim. The victim in this case is clearly continuing to experience serious emotional trauma and the not uncommon feelings of shame and self doubt that are so inappropriate for the victim to feel and yet so common and so distressing. The effect that she has described also goes beyond her to the effect on her family and friends who have provided her with support and the blame they also feel for not intervening.
<i>R v Kennedy</i> ⁴¹¹ (SA)	I have received a victim impact statement from the complainant. It is clear your offending has had a significant impact upon her. She now feels anxious and scared when she hears unusual noises, she can't concentrate efficiently to study or work. She is

⁴⁰⁹ [2014] VCC 42 [27]-[30].

⁴¹⁰ [2015] ACTSC 322 [71]-[72].

⁴¹¹ (Unreported, SADC, 27 April 2016).

	desperate for her normal life back and [to] be able to function. She suffered the feelings that many people in her situation feel after an offence such as this. She felt humiliated, embarrassed, powerless and dirty. It is not surprising that your behaviour has had such a significant impact upon her.
<i>DPP v McLachlan</i> ⁴¹² (Vic)	I have received a victim impact statement. In it the victim indicated that as a result of your offending she felt empty; or as she put it, “numb”. She has lost trust in others. Sadly, she says she blames herself for “letting you in”. Of course, the victim should not in any way blame herself for what happened in this case ... There can be no doubt that the victim suffered significant, enduring physical and psychological trauma as a result of your offending. It is to be hoped that now that this process is completed she can successfully move on with her life, assisted by whatever psychological counselling is necessary.

In the case of *Ballantyne*,⁴¹³ Murrell CJ of the ACT Supreme Court recognised the victim by detailing the harm caused to her by the offending, including the difficulties encountered by the victim’s family in supporting her through the justice process. Her Honour next vindicated the victim by specifically stating that ‘the Court acknowledges the suffering’ of the victim. This was followed by an expression of respect and validation for the victim, through the statement that the court ‘hopes that, as a consequence of the resolution of these proceedings, the victim and her family can come to terms with what has occurred and move on with their lives.’ By referring to the victim’s future in this way, Murrell CJ has encouraged the victim to see the resolution of the criminal proceedings as a turning point in her life.

In *Scrivener*,⁴¹⁴ McIntyre J of the South Australian District Court acknowledged the victim by noting that she had read ‘her very eloquent victim impact statement’ in court. By describing the victim’s statement as ‘eloquent’, McIntyre J has drawn attention to the way that the victim’s words had moved her personally. McIntyre J honoured the victim by recognising that this had taken

⁴¹² [2015] VCC 1164 [20]-[22].

⁴¹³ (Unreported, ACTSC, 1 April 2014).

⁴¹⁴ (Unreported, SADC, 6 June 2014).

‘great courage.’ She then vindicated the victim by explaining that the offender’s actions were a ‘gross breach’ of trust, which would continue to affect the victim’s life into the future.

Likewise, in *QMT*,⁴¹⁵ Wood J of the Tasmanian Supreme Court recognised the victim by detailing the physical and emotional harm caused as a consequence of the offending. She next acknowledged that what had happened to the victim was wrong, by explaining that ‘such adverse effects are often long-lasting, affecting wellbeing, relationships and many facets of a [victim’s] life.’ Her Honour then went on to vindicate the victim, by stating that ‘the sentence must adequately reflect the nature of these crimes, the terrible ordeal experienced by the complainant and the harm [the offender had] caused to her.’

In *Barbat*,⁴¹⁶ Sexton J of the Victorian County Court recognised the victim by summarising the contents of the victim’s impact statement. She then exemplified the way that judges can use sentencing remarks to speak to the offender, the victim, and the community about right and wrong conduct by specifically denouncing the offender’s conduct. She did so by addressing him directly, stating that he ‘should feel ashamed at the impact [his] actions have had’ on the victim. Later in the remarks, Sexton J affirmed that the victim was believed by the court, by admitting that ‘[n]othing I say can make [the victim] feel safer or improve her outlook on life ... However, I assure [the victim] that I have taken the impact on her very much into account in my sentence.’ Sexton J then concluded her comments by further vindicating the victim through ‘encourag[ing] her to continue to seek assistance for as long as she needs’ and ‘wish[ing] [the victim] well in the future.’

In *Stanley*,⁴¹⁷ Refshauge J of the ACT Supreme Court recognised the victim by explaining how important it was that her statement was read aloud, so that the offender could hear what she had written. By doing this, the judge recognised the

⁴¹⁵ (Unreported, TASSC 11 May 2015).

⁴¹⁶ [2014] VCC 42 [27]-[30].

⁴¹⁷ [2015] ACTSC 322.

communicative role that victim impact statements can play in the sentencing process. He then validated the victim by explaining how he and others present in the courtroom had empathised with her: 'it was difficult to hear that victim impact statement without experiencing some of the pain and hurt that the victim described.' He further validated and vindicated the victim by explaining that it is 'very valuable to hear the voices of the victims,' and by comforting the victim through his explanation that her 'feelings of shame and self doubt ... are so inappropriate for the victim to feel and yet so common and so distressing.'

Similarly, in *Kennedy*,⁴¹⁸ Davison J of the South Australian District Court recognised the victim by describing the harm caused by the offending and stating that 'it is clear your offending has had a significant impact upon [the victim].' She then validated the victim by explaining that 'she suffered the feelings that many people in her situation feel after an offence such as this,' before vindicating her: 'it is not surprising that [the offender's] behaviour has had such a significant impact upon [the victim].' In taking this approach, Davison J used her judicial authority and experience to bring comfort to the victim by assuring her that she was not alone in the way that the crime had affected her.

Finally, in *McLachlan*,⁴¹⁹ Howard J of the Victorian County Court validated the victim by using her own words to explain that 'a result of [the] offending she felt empty; or as she put it, "numb".' He then vindicated and reassured the victim by describing her misplaced self-blame, arguing that 'of course, the victim should not in any way blame herself for what happened in this case.' He further validated the victim through his statement that 'there can be no doubt that the victim suffered significant, enduring physical and psychological trauma as a result of your offending.' Howard J concluded the comments he directed at the victim by respectfully hoping that following the resolution of the trial, and assisted by appropriate counselling, she might now 'successfully move on with her life.' In taking this approach, like Murrell CJ in *Ballantyne*, Howard J also

⁴¹⁸ [Unreported, SADC, 27 April 2016].

⁴¹⁹ [2015] VCC 1164.

encouraged the victim to see the resolution of the criminal proceedings as a turning point in her life.

2 Examples of Victim Dissatisfaction

The cases extracted above demonstrate that a range of approaches may be used by judges in order to implicitly meet victims' justice needs for voice, validation, and vindication when sentencing.⁴²⁰ This involves judicial acknowledgment that the victim has been offended against, that the offending was wrong, and that the harm outlined by the victim in their impact statement is believed by the court. However, the interview findings further reveal that this level of acknowledgment cannot be understood as being definitively therapeutic for victims. For example, Jessica from South Australia was disappointed by the following acknowledgment from the judicial officer in her case:

I had the benefit of hearing from the victim who personally read her Victim Impact Statement ... it certainly does highlight the devastating and significant impact this offending has had upon the victim. I make it clear that the Victim Impact Statement is but one of a number of factors I need to take into account, but it is a significant factor. It was a powerful document. That is hardly surprising — given the breach of trust and the nature of the offending in this matter.

This extract⁴²¹ does not differ in any noticeable way from the type of acknowledgment valued by the other victims. The judge's words clearly indicate that the offending was wrong and that the court believed Jessica's statement about the harm caused by the offending. However, during her interview, Jessica

⁴²⁰ The remaining cases from the dataset that were identified as containing therapeutically effective acknowledgment are: *R v March* [2014] ACTSC 244 [1], [8], [26] (Murrell CJ); *R v Singh* (Unreported, SADC, Barrett J, 5 June 2014); *R v BAS* (Unreported, TASSC, Wood J, 20 August 2014); *DPP v Cashion* [2014] VCC 222 [7]-[9] (Parsons J); *DPP v Pirimapun* [2014] VCC 520 [31] (Cohen J); *DPP v Sheriff* [2014] VCC 2128 [5] (Patrick J); *R v Hill* [2015] ACTSC 289 [17]-[18] (Robinson AJ); *R v Kindl* [2015] ACTSC 128 [5] (Murrell CJ); *R v SP* [2015] ACTSC 121 [21] (Walmsley AJ); *R v Sordini* [2015] ACTSC 45 [24] (Refshauge J); *R v Chehayeb* (Unreported, SADC, Millstead J, 29 June 2015); *R v RCC* (Unreported, TASSC, Wood J, 29 August 2015); *DPP v Sadaka* [2015] VCC 343 [15]-[17] (Sexton J); *DPP v Chase* [2015] VCC 669 [4]-[5] (Grant J); *DPP v Reid* [2015] VCC 1304 [15] (Patrick J); *DPP v Patel* [2016] VCC 194 [18] (Patrick J).

⁴²¹ Some information has been removed to avoid identifying the victim.

reported that the judicial officer only ‘made reference to “having heard the victim’s impact statement,” and said “I know how this has affected the victim” ... [but that was] pretty well it.’ While the judicial officer in Jessica’s case did clearly refer to the harm she had suffered in more detail than she described, Jessica’s dissatisfaction with the sentencing remarks reflects her overall dissatisfaction with the way that the case was managed. She was unhappy that the prosecution accepted a plea from the offender to a lesser sexual offence than that which was originally charged, and this had obvious and negative ramifications for Jessica’s experience of the justice system generally. Jessica’s example therefore reveals just how difficult it can be for judges to accord with victims’ needs when sentencing, because victims’ experiences of sentencing do not occur in a vacuum.

Tasmanian victim Eve was also disappointed by the level of acknowledgment in her case, but for different reasons. In sentencing the offender, the judge in Eve’s case first explained that the ‘impact statement shows that the crimes had a significant impact on [Eve]. The crime made her feel humiliated and powerless. She had great difficulty reliving the event [throughout the court process].’ This extract reflects the type of validation and vindication appreciated by the other victims. However, the judge next went on to describe the emotional and psychological difficulties that Eve had experienced because of earlier family tragedies, her subsequent reliance on alcohol as a coping mechanism, and her history of self-harm and admissions to mental health facilities as a result of suicidal ideation.⁴²² Eve was uncomfortable with the judge sharing this level of detail about her life, particularly because of media interest in the trial. Eve said that wide reporting of the content of her impact statement in both print and social media ‘made it hard ... because that was in the paper, and it was in the news. It was horrible to hear parts of my personal victim impact statement shared to everybody.’⁴²³ Accordingly, the findings from Eve’s interview suggest

⁴²² The sentencing remarks in Eve’s case, like all Tasmanian remarks, are permanently available online. Accordingly, they have not been fully transcribed here, so as to avoid breaching Eve’s anonymity.

⁴²³ While no other interviewed victims expressed similar concerns, Witness Assistance Officer Robert from Tasmania confirmed that the problem is not isolated to Eve’s experience. Problems of excessive media reporting appear to arise in Tasmania from

that explicit and detailed reference to victims' pre-existing vulnerabilities, such as mental health issues, may result in anti-therapeutic outcomes for victims, even if the judicial acknowledgment has otherwise addressed factors that victims generally find to be therapeutic.

Two cases from the analysed dataset contain similar levels of information about the victims' personal circumstances. In the Tasmanian case of *R v Craig*,⁴²⁴ the judge mentioned the victim's mental health prior to the offending, as well as discussing in great detail the harm experienced by the victim as a consequence of the offending:

The complainant has been severely affected by this crime. She suffers from post-traumatic stress disorder and is under the care of a psychiatrist. Her mental health was to an extent vulnerable beforehand, but she was someone who was managing well and did not require any specialist care.

Since the rape was committed, the contrast in her condition is stark. The complainant has attempted to end her life and engaged in serious self harm on multiple occasions. She nearly died on one occasion and on other occasions required surgical intervention. Her suicidality has subsisted for a lengthy period of time. In 2014 and 2015 she had 50 admissions to hospital for her self-destructive impulses. There is a risk of lasting psychiatric harm.

Likewise, in the South Australian case of *R v F,K*,⁴²⁵ the judge discussed in detail the victim's mental health prior to and as a result of the offending:

Eighteen months prior to the incident, the victim had been diagnosed with anxiety and fatigue for which she was receiving therapy at the time of this offence ... it was a violent attack ... She suffered physical injuries in the way of

time to time, with Robert stating that some victims 'don't want everyone to hear [the details of their impact statement], particularly the media.' Witness Assistance Officer Samuel from South Australia also noted the problem arising in his jurisdiction. Samuel argued that limiting the level of personal information shared about a victim at sentencing is 'important in cases where there are lots of media.'

⁴²⁴ (Unreported, TASSC, 26 May 2016).

⁴²⁵ (Unreported, SADC, 30 June 2016).

bruising and abrasions and ... has been diagnosed with post-traumatic stress disorder.

The discussion of harm in these cases demonstrated that each judge had carefully considered the content of the impact statement received. Yet the explicit and personal information about each victim's mental health, namely the judge's detailed description in *Craig* of the victim's suicidal ideation, including 50 hospital admissions for 'self-destructive impulses,' and the judge's reference in *F, K* to the 18 months of therapy the victim had received prior to the time of the offending, are similar to the level of detail that Eve found so distressing. This may consequently have diminished the therapeutic benefits that the victims from those cases might have obtained from the judicial acknowledgment.

It is quite possible that these detailed discussions of harm are examples of judicial emphasis of a number of sentencing purposes, such as denunciation, 'just' punishment, or rehabilitation. Because denunciation 'requires that a sentence should ... communicate society's condemnation of the particular offender's conduct,'⁴²⁶ it may be that the details the judges chose to include in their remarks were the details that they believed made clear to the offender the exact conduct that was being denounced. Similarly, the judges may have chosen to include such explicit detail because harm caused to the victim is relevant in determining offence seriousness under a just deserts approach. It may also be that the information was included because the judges were hopeful that educating the offender on the specific consequences of their offending might assist in their rehabilitation.

These are all important sentencing considerations. However, due to the possibility of problematic outcomes for victims arising from the inclusion of such personal information, Victorian Witness Assistance Officer Andie has argued that 'boundaries' must be introduced regarding the information that judicial officers are allowed to share about victims when sentencing. Recommendations for the introduction of such 'boundaries' are explored in Section V below.

⁴²⁶ *Ryan v R* (2001) 206 CLR 267 [118] (Kirby J).

C Cases with No Impact Statement Submitted

The analysis of the sentencing remarks dataset reveals that therapeutically effective judicial acknowledgment of victim harm is possible even in cases where a victim impact statement has not been submitted. The court is usually aware of the type of harm that may have been experienced by the victim. This is informed by the offence type, and the circumstances surrounding the offending outlined in evidence or the agreed facts. As Southwell, Ormiston and McDonald JJ explained in *R v Miller*, sentencing judges may draw ‘reasonable inferences’ from the evidence before them ‘of any injury, loss or damage suffered by victims and their immediate families.’⁴²⁷ In the absence of an impact statement, it is unlikely that a judge will be able to meet a victim’s need for validation, which requires affirmation that the victim’s statement is believed by the court. However, it is still possible for a judge to ensure that the victim’s need for acknowledgment and vindication are met. The analysed remarks contain seven examples where harm to the victim was identified as being effectively acknowledged, even in the absence of an impact statement. These include:

In the case of *R v Agresti*,⁴²⁸ Murrell CJ of the ACT Supreme Court first noted that the court did not receive an impact statement. She then acknowledged and vindicated the victim by explaining that she had ‘no doubt that the offence had a very significant impact on the victim’s psychological wellbeing.’

In the case of *R v Kubsch*,⁴²⁹ Rice J of the South Australian District Court acknowledged the victim by saying that although no impact statement had been submitted, ‘that is not to say your offending was without a significant impact upon [the victim].’ Rice J further vindicated the victim by recognising the harm caused to her, explaining that she was ‘unwilling to give a statement because to do so would revive memories of [the] offending.’

⁴²⁷ *R v Miller* [1995] 2 VR 348, 354.

⁴²⁸ [2016] ACTSC 9 [8].

⁴²⁹ (Unreported, SADC, 6 February 2015).

Likewise, in the case of *DPP v Douglas*,⁴³⁰ Murphy J of the Victorian County Court vindicated the victim by explaining that while she did not submit a statement, ‘her demeanour when giving evidence in the trial was a graphic indication of the impact of your crimes on her.’ Murphy J further acknowledged and vindicated the victim by saying that ‘this must have been a traumatic, humiliating experience for a defenceless woman.’

Because of the absence of an impact statement, acknowledgment of victim harm in these cases cannot match that which is possible in cases where an impact statement has been submitted. Nevertheless, the judges who published the remarks quoted above clearly made an effort to meet the victims’ justice needs by demonstrating that they understood that the victims had suffered as a consequence of the offending. In such cases, this approach should be encouraged.⁴³¹

In contrast, in only one case in the dataset did the judicial officer note the lack of impact statement, and then fail to consider the harm that may have been caused to the victim. This occurred in *R v AGB*,⁴³² when the judge said: ‘I have no victim impact statement and therefore have no information as to what, if any impact, your behaviour has had on [the victim].’ This is inconsistent with usual approaches to the absence of a victim impact statement, and is contrary to the guidance of Gray P, Refshauge and Ryan JJ in *R v Eisenach*, who noted that even ‘without specific evidence, a sentencing court will be aware of the destructive effects of offences.’⁴³³ Accordingly, it is submitted that the judge’s approach in *AGB* should not be followed, as it is likely to cause anti-therapeutic effects for victims and the criminal justice system more broadly.

⁴³⁰ [2015] VCC 1038 [18]-[19].

⁴³¹ See also *DPP v Ramlagun* [2014] VCC 270 [12] (Gucciardo J); *R v Hile* [2015] ACTSC 236 [9] (Robinson AJ); *R v NQ* [2015] ACTSC 308 [8] (Robinson AJ); *R v Tapau* [2015] VCC 239 [13] (Parsons J).

⁴³² *R v AGB* (Unreported, TASSC, 28 January 2015).

⁴³³ *R v Eisenach* [2011] ACTCA 2 [65]. See also *R v Miller* [1995] 2 VR 348, 354 (Southwell, Ormiston and McDonald JJ).

D Judicial Reference to Instrumental and Expressive Purposes of Statements

As discussed in Chapter 3, while the relevant sentencing legislation requires that, when sentencing, the court must recognise the victim, or have regard to the impact of the offence on the victim,⁴³⁴ current Australian impact statement regimes give no indication ‘as to how the court will use such statements and what weight [they] will be afforded.’⁴³⁵ In many cases in the dataset, the harm outlined in the victim’s statement was simply repeated or summarised by the judge. Some judges also mentioned that the victim’s statement was ‘taken into account,’ but without specifying how they had done so.⁴³⁶ When a judge says that they have ‘taken into account’ a victim impact statement, this could demonstrate that the judge has recognised or had regard to the victim in accordance with the relevant sentencing legislation. Additionally or alternatively, it could mean that the judge had relied upon the statement in determining the offender’s sentence. However, these brief references do not assist with any analysis seeking to definitively determine how the judge has used the statement, and what, if any, weight has been given to it.

Accordingly, the findings of this content analysis do little to alleviate the existing confusion over instrumental and expressive uses of victim impact statements in practice. This is not unexpected, because as Light has argued, an analysis of sentencing remarks alone cannot ‘definitively determine the mechanisms’⁴³⁷ that drive judges when sentencing. As outlined in Chapter 4, one of the limitations of this research is the fact that no judicial officers were interviewed about their choices around incorporating victim acknowledgment in their sentencing

⁴³⁴ *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(d); *Sentencing Act 1997* (Tas) s 3(h); *Sentencing Act 1991* (Vic) s 5(2AC)(2).

⁴³⁵ Booth, above n 92, 36.

⁴³⁶ For example, see *DPP v Barbat* [2014] VCC 42 [29] (Sexton J); *R v Singh* [2014] ACTSC 250 [6] (Rares J); *DPP v Daglas* [2015] VCC 1038 [18] (Murphy J); *R v Sordini* [2015] ACTSC 45 [46] (Refshauge J); *R v SP* [2015] ACTSC 121 [21] (Walmsley AJ); *R v Taylor* [2015] ACTSC 43 [53] (Refshauge J); *R v Mould* (Unreported, SADC, Costello J, 7 May 2015).

⁴³⁷ MT Light, ‘The New Face of Legal Inequality: Noncitizens and the Long-term Trends in Sentencing Disparities across US District Courts, 1992-2009’ (2014) 48(2) *Law and Society Review* 447, 473. See also Roach Anleu, Brewer and Mack, above n 374.

remarks. Future research would benefit greatly from judicial interviews on this subject.

V EDUCATING JUDGES ON THE THERAPEUTIC OUTCOMES OF ACKNOWLEDGING VICTIMS AT SENTENCING

The results of the analysis of the sentencing remarks dataset, as well as the interviews with victims and justice professionals, have revealed that judicial acknowledgment consisting of merely one sentence is anti-therapeutic to victims. The findings also indicate that victims respond differently and unpredictably to more detailed remarks. While some victims were greatly satisfied with judicial acknowledgment that implicitly met their needs for vindication, validation and voice, other victims felt that the detailed acknowledgment in their case was either too little or too much. These findings therefore demonstrate the significant challenges that judicial officers encounter in crafting therapeutically effective remarks. This Section consequently recommends a number of practical strategies to help judges develop an understanding of how to effectively and therapeutically acknowledge victims when sentencing, while still balancing other requirements under Australian sentencing regimes. These recommendations are designed to achieve the therapeutic jurisprudence goal of minimising the unintended anti-therapeutic effects of impact statement processes, and maximising the potential for healing for the victim.⁴³⁸

A Recommendation 1: The Publication of a Victim-Focused Benchbook

Chapter 2 mentioned an earlier recommendation of the Victorian Victim Support Agency,⁴³⁹ namely that judicial education courses throughout Australia should inform judicial officers of the benefits of acknowledging the harm suffered by the victim at sentencing. The findings of this Chapter suggest that this recommendation does not go far enough. Instead, this thesis suggests that

⁴³⁸ Winick, above n 42, 536.

⁴³⁹ Victorian Victim Support Agency, above n 31, 82.

judicial officers could be better assisted by the publication of a victim-focused benchbook to provide detailed information about the potential for both therapeutic and anti-therapeutic outcomes for victims, based on different levels of judicial acknowledgment.

This benchbook, which should be jointly developed with the assistance and expertise of justice professionals experienced in working with victims, must be designed to guide judges concisely and clearly through the ‘dos and don’ts’ of victim acknowledgment at sentencing. It should contain real-life examples, like those included in this Chapter, to illustrate particular judicial approaches that appear to have effectively and therapeutically met the needs of the victims involved. It should also flag matters of particular sensitivity to victims, such as sharing details about their mental health, which should perhaps not be published too explicitly in sentencing remarks. The benchbook could suggest alternative ways to handle this sort of information, based on the findings of this Chapter around the style of remarks identified as being most likely to have therapeutic outcomes for victims.

When first published, the benchbook could be introduced to judicial officers and justice professionals at judicial or other professional conferences across Australia. Subsequent professional development sessions could follow, to enable judges and justice professionals to share their experiences and examples of ‘what works’ and ‘what doesn’t’ from a victim-focused perspective.

B Recommendation 2: The Introduction of Victim-Focused Pre-Sentencing Hearings

As explored throughout this Chapter, victims may experience anti-therapeutic outcomes when judges speak too explicitly about victims’ personal issues in their sentencing remarks. In her interview, Victorian Witness Assistance Officer Andie argued that ‘boundaries’ must be introduced regarding the information that judicial officers are allowed to share about victims when sentencing. Consequently, this thesis recommends the introduction of a mechanism that will allow judges to be informed, prior to sentencing, if there is material within a

victim impact statement that is particularly sensitive and should not be outlined in explicit detail in the judge's sentencing remarks. This would require the judicial officer to convene a short pre-sentence hearing with prosecution and defence counsel, where any particularly sensitive material could be identified by the prosecutor. This hearing would also benefit the defence, by allowing the judicial officer to make clear what information from the impact statement would be relied on in passing sentence. As will be discussed further in Chapter 6, this approach would allow the defence to raise, if relevant, any issues they may have with the content of the impact statement, prior to the submission of the statement at the sentencing hearing.

VI CONCLUSION

Sentencing remarks are a communication tool that can be used by judges to acknowledge victims, and in doing so, recognise the harm caused to them by the offending. Yet actual judicial practice in relation to the use of impact statements at sentencing has very rarely been empirically researched, and no previous research had sought to quantify judicial acknowledgment of victims at sentencing. Consequently, this Chapter sought to determine exactly how and how often judicial officers refer to and acknowledge victims and their impact statements in practice. It also sought to determine whether recommendations could be made for best possible judicial practice in acknowledging victims, from a victim-focused perspective.

The findings from this Chapter have identified that judicial acknowledgment at sentencing can meet a number of victims' justice needs, including voice, validation and vindication. This cannot be achieved through a one-line reference to victims or their statements. Other than this, however, an ideal approach cannot be definitively identified. Some victims were satisfied with clear and specific articulation that the judge, and therefore the court, understood, acknowledged and believed the harm caused to them. However, this approach does not guarantee victim satisfaction in all cases, as was demonstrated by the examples of South Australian victim Jessica and Tasmanian victim Eve.

The Chapter therefore recommended the implementation of two particular mechanisms to assist judges to understand how best to therapeutically and effectively acknowledge victims at sentencing. The first recommendation is the publication of a victim-focused benchbook, to be developed in collaboration with victim experts. Assisted by the analysis and discussion in this Chapter, this benchbook would guide judges concisely and clearly through the 'dos and don'ts' of victim acknowledgment at sentencing. The second recommendation is the introduction of a short, victim-focused pre-sentence hearing. This hearing would benefit all parties involved, first by allowing the judge to identify the information from the victim impact statement that they intend to rely on in passing sentence. It would secondly allow prosecutors to raise any issues of particular victim vulnerability in relation to the content of the impact statement. It would thirdly enable the defence to raise any points of concern with respect to the content of the impact statement.

These recommendations should, in conjunction with the recommendations contained in the following two Chapters, assist in increasing therapeutic outcomes for victims. The next Chapter focuses on one of the key findings of the victim and justice professional interviews, and further examines the previously discussed widespread confusion over the purpose and use of victim impact statements by the court.

CHAPTER 6:

VICTIM IMPACT STATEMENTS: BALANCING EXPRESSIVE AND INSTRUMENTAL APPROACHES

I	Introduction	121
II	The Purpose of Victim Impact Statements	122
	<i>A The Manikis Model</i>	126
III	The Content and Reliability of Victim Impact Statements	129
	<i>A Impact Statement Content</i>	129
	<i>B Impact Statement Reliability</i>	137
IV	Timeframes for Completing Victim Impact Statements.....	140
V	The Presentation of Victim Impact Statements	142
	<i>A Impact Statement Form</i>	142
	<i>B Verbal Submission of Statements</i>	143
	<i>C Written Submission of Statements</i>	145
	<i>D Presentation Using Vulnerable Witness Provisions</i>	146
VI	Summary of the Proposed Australian Model.....	149
VII	Choosing Not to Submit an Impact Statement	155
VIII	Conclusion and Recommendations.....	157

I INTRODUCTION

During 2015 and 2016, interviews were conducted with six victims of sexual offending and 15 justice professionals, including 12 victim support and witness assistance officers, and three prosecutors experienced in working on sexual offence cases. The interviews were designed to fulfil one of the major research aims of this thesis, namely to achieve a better understanding of sexual offence victims' perspectives of impact statement and sentencing processes and procedures across the ACT, South Australia, Tasmania and Victoria.

The interviews revealed two overarching problems around impact statements and sentencing. The first is the subject of this Chapter, while the second is the subject of Chapter 7. The first problem is the significant effect that pervasive

uncertainty around the purpose of victim impact statements has on victims' and justice professionals' understanding and experiences of these statements. This lack of clarity has ramifications both for victims, and for the justice professionals who work with victims in preparing and submitting impact statements. Due to this lack of clarity, issues can arise at every stage of the statement process, starting with the initial information that justice professionals provide to victims about their right to submit a statement, the support and guidance that is provided to victims in preparing their statement, the process of submitting the statement to the court, and finally, as explored in Chapter 5, the receipt and acknowledgment of these statements by judicial officers in court.

This Chapter explores the consequences of this uncertainty through a victim-focused, therapeutic jurisprudence lens. It proposes a solution to the lack of clarity and consistency by applying a modified version of Manikis' Canadian Multi-Functional Model for Victim Impact Statements⁴⁴⁰ to the Australian context. The proposed solution combines instrumental and expressive approaches to impact statements, but where these are inconsistent, prioritises a victim focus, without subordinating due process for the offender.⁴⁴¹ The solution therefore achieves the therapeutic jurisprudence goal of minimising the unintended anti-therapeutic effects of impact statement processes, and maximising the potential for healing for the victim.⁴⁴²

II THE PURPOSE OF VICTIM IMPACT STATEMENTS

Chapter 3 explored the inconsistent messages provided by sentencing legislation as to the purpose and permissible content of impact statements. Some legislative provisions indicate that judges can use impact statements instrumentally, while others imply that they are instead to be used for the expressive benefits they may provide victims. Also identified was the consequential inconsistency in impact statement policies and guidelines across the research jurisdictions.

⁴⁴⁰ Manikis, above n 95, 85.

⁴⁴¹ Wexler, above n 44, 125.

⁴⁴² Winick, above n 42, 536.

These inconsistencies were cause for lengthy discussion during interviews with both victims and justice professionals. There was no consensus from the justice professionals as to their understanding of the purpose of impact statements. Several interviewees viewed them as having at least some instrumental effect on sentencing:

I would explain that the victim impact statement makes up a part of a plea hearing, and that the judge will take it into account when forming a sentence. (Andie, Witness Assistance Officer, VIC)

I don't think it's true to say that [impact statements are] not supposed to have any impact on the sentence ... the fact that [victims] might have nightmares, or can't sleep, or feel revolted, or it's affected their sex life, of course the judge can take that into account. (Michael, Prosecutor, TAS)

If the offender has been found guilty, then the victim impact statement can definitely inform the judge's decision around sentencing. (Alisa, Victim Support Officer, VIC)

In contrast, only one justice professional held the belief that statements do not have any instrumental purpose:

We are very clear to let them know that it's a therapeutic process for them as opposed to be[ing] something that is intended to affect the sentence. (Harriet, Witness Assistance Officer, TAS)

Others held uncertain views. Two witness assistance officers explained the complex discussions they have with victims when trying to clarify the purpose of these statements:

Different stakeholders will use [the impact statement] for different purposes, and that's a thing that can cause issues. It's not just about what the victims want to say. It's about what the prosecution can present. It's about what the defence won't allow. It's about what the judge can receive. I think what is very difficult for victims, is that they think it's their opportunity to speak, when in fact a whole

lot of people have a lot to say about what is presented in that victim impact statement. (Samuel, Witness Assistance Officer, SA)

A lot of people ask me if it will make any difference to sentence, and I say I don't know ... I always say to people that I don't think it will necessarily result in a higher sentence and that essentially that's not the purpose of it. I always say to people it's important that [the court] hears the specific details of how it has affected you ... I also say that for a lot of people I deal with it seems to have a therapeutic effect. (Robert, Witness Assistance Officer, TAS)

These findings confirm the complicated reality of working within a system that does not prescribe exactly how the court should use these statements.⁴⁴³ Given the lack of consistency between legislative instruments, policies and guidelines, both within and across jurisdictions, these findings are not surprising. They are, however, problematic. This lack of clarity prevents justice professionals from providing victims with accurate information about the ways the court may use the information contained in victim impact statements.

Notably, each of the interviewed victims viewed their impact statement solely as an expressive tool:

[I did it because] I could let the judge know [about the harm I experienced], because otherwise nobody would know. It was also a chance to have a bit of power, and stand up and have my say, and be listened to, which I really liked the idea of. (August, Victim, SA)

It's one's opportunity to put it into [my] own perspective, and to say 'these are the consequences I suffer as a result of what you did to me.' (Jessica, Victim, SA)

You never have an opportunity to say anything to [the offender or the court] ... so, that was the most important part, for me. (Laura, Victim, SA)

The victim impact statement became the avenue for me to have some sort of voice in the process. (Philippa, Victim, SA)

⁴⁴³ Booth, above n 92, 36.

It was predominantly for, because he pleaded guilty, my chance to say my piece ... it served that purpose, and that's why I chose to do it. (Emily, Victim, TAS)

I wanted to do it ... because I felt that I didn't have a voice through the process. There was nothing that I was allowed to say through free will without being cut off in the courtroom ... For me, the purpose of it was that I got a voice, and I got to tell [the judge] how I was feeling, rather than just the facts of what happened that night. (Eve, Victim, TAS)

This finding is significant, because one of the early criticisms of impact statement schemes was victims' reported level of dissatisfaction with the impact statement process once they realised that their statement had not or would not increase the sentence imposed on the offender.⁴⁴⁴ However, no victim interviewed for this research believed that the role of their statement was to increase the offender's sentence; accordingly, there was no lack of satisfaction reported by any victim on the basis of such misunderstanding.⁴⁴⁵

While no victim was dissatisfied on the basis of such a misunderstanding, the potential remains for victim disappointment arising from other unmet expectations, which may stem from confusion over the actual purpose of impact statements. If, like the victims interviewed for this research, other victims view their statements solely as an expressive tool, they may not understand that under current sentencing regimes, statements can be used instrumentally. As explored in Chapter 3, this involves the possibility that the defence could object to all or parts of the statement, which in turn could lead to cross-examination of the victim and/or the impact statement being edited by the court. While research suggests that this does not happen frequently in Australian jurisdictions,⁴⁴⁶ it can

⁴⁴⁴ See Section VI of Chapter 2.

⁴⁴⁵ As discussed in Chapter 4, because the sample of victims was self-selecting, their reported understanding of the purpose of their impact statement cannot be seen to be representative of all victim experiences: Tranter, above n 356.

⁴⁴⁶ In South Australia, O'Connell's research found that only two judicial officers could identify a case where victims had been cross-examined on their impact statements: O'Connell, above n 31, 5. The Victorian Victim Support Agency's research also found

cause problems when it does occur. As South Australian Witness Assistance Officer Samuel explained, 'it's very distressing ... I think it's the one time that victims feel like they're getting a voice, only to have that voice taken away.'⁴⁴⁷ Accordingly, it is vital that all Australian jurisdictions clarify the specific purposes for which impact statements can be used. This will allow justice professionals to provide clearer guidance to victims who prepare these statements, and should prevent the potential for victim disappointment arising from unmet or incorrect expectations.

A The Manikis Model

Manikis has recently discussed the same problem of confusion over the role and purpose of impact statements in Canada, due to the inconsistency between instrumental and expressive approaches. In response, she has developed a 'multi-functional model justified by a principled analysis and evidence-based findings'⁴⁴⁸ (the Model). According to Manikis, the Model, which is outlined in Table 6.1 below, embraces both instrumental and expressive approaches to statements. The instrumental function is valued because it enables judges to 'facilitate a more accurate and informed assessment of harm.'⁴⁴⁹ Based on previous findings that judges believe that the content of an impact statement may help them to impose 'a more commensurate sentence,'⁴⁵⁰ the Model recognises that an instrumental approach 'can serve retributive purposes, including denunciation, while also according with the fundamental principle of proportionality.'⁴⁵¹ However, the Model also embraces the expressive role of impact statements, recognising that statements can offer a therapeutic experience for victims, and can assist the court to appropriately acknowledge the

that 98 per cent of judicial officers said that cross-examination of victims on their impact statements almost never or never happened: Victorian Victim Support Agency above n 31.

⁴⁴⁷ See also Tracey Booth, above n 98.

⁴⁴⁸ Manikis, above n 95, 109.

⁴⁴⁹ Ibid 110.

⁴⁵⁰ See, eg, Michael O'Connell, above n 31, 6; R S Sloan Associates, above n 133; Erez, above n 92, 548.

⁴⁵¹ Manikis, above n 95, 110.

harm caused by the offending. The Model further recognises that, when used expressively, information about the harm experienced by the victim could potentially educate and assist offenders in their rehabilitation.⁴⁵² Table 6.1 schematises the Model, by framing it within Manikis' understanding of the rules required by instrumental and expressive impact statement regimes.

Table 6.1: The Manikis Model

Issue	Instrumental Approach	Expressive Approach	The Manikis Model
1. Clarity Lack of clarity around the function and purpose of impact statements	Under an instrumental approach, impact statements are used by the judge to assess harm to the victim and therefore determine a proportionate sentence. ⁴⁵³	Under an expressive approach, impact statements are a cathartic tool for the victim, who is allowed to express the harm caused to them by whichever means they choose. It has no bearing on the offender's sentence. ⁴⁵⁴	The Manikis Model values both the instrumental and expressive functions of impact statements. ⁴⁵⁵
2. Content The permissible content of impact statements	Impact statements should only contain information about the actual harm caused to the victim by the offending for which offenders are convicted. This is the only information that is considered relevant to the determination of sentence. ⁴⁵⁶	Impact statements can contain any information the victim wishes to include, because the impact statement is not relied upon by the judge in sentencing. ⁴⁵⁷	Impact statements can contain any information the victim wishes to include, but only the actual harm caused to the victim will be considered relevant to the determination of sentence. It is the responsibility of the judicial officer to discard irrelevant

⁴⁵² Ibid 111.

⁴⁵³ Ibid 94.

⁴⁵⁴ Ibid 92.

⁴⁵⁵ Ibid 110.

⁴⁵⁶ Ibid 101.

⁴⁵⁷ Ibid.

Issue	Instrumental Approach	Expressive Approach	The Manikis Model
			information when sentencing the offender. ⁴⁵⁸
3. Form The permissible form of the impact statement	Victims can present their statement only in writing. ⁴⁵⁹	Victims can present their statement in a variety of forms, including prose, poems, drawings and songs. ⁴⁶⁰	Victims can present their statement only in writing. ⁴⁶¹
4. Cross-examination The permissibility of cross-examining victims on their impact statement	Victims can be cross-examined on the content of their impact statement. ⁴⁶²	Victims cannot be cross-examined on the content of their impact statement. ⁴⁶³	Victims can be cross-examined on the content of their impact statement, though those with specific needs can only be cross-examined under vulnerable witness provisions. ⁴⁶⁴
5. Timeframes The timeframes for preparation and disclosure of the impact statement	'Adequate' disclosure of the statement to the defence is required. ⁴⁶⁵	Manikis has not identified parameters for disclosure under an expressive approach.	Early disclosure of the impact statement to the defence is required. ⁴⁶⁶
6. Presentation The permissible methods for impact	Victims may not personally read their statement to the court. It can be presented in writing,	Victims may present their statements verbally to the court, or it may be presented verbally	Victims may present their statements verbally to the court. ⁴⁶⁹

⁴⁵⁸ Ibid 113.

⁴⁵⁹ Ibid 104.

⁴⁶⁰ Ibid.

⁴⁶¹ Ibid 114.

⁴⁶² Ibid 107.

⁴⁶³ Ibid 108.

⁴⁶⁴ Ibid 115.

⁴⁶⁵ Ibid 100.

⁴⁶⁶ Ibid 115.

Issue	Instrumental Approach	Expressive Approach	The Manikis Model
statement presentation	or read aloud by the prosecutor. ⁴⁶⁷	by another person of the victim's choosing. ⁴⁶⁸	

Because it was created to address problems similar to those that arise in Australia, the Canadian Model developed by Manikis is also relevant to the Australian context. This Chapter critiques the Model, and explores its applicability and transferability to the Australian jurisdictions covered by this research. In contrast to the Manikis Model, which is largely guided by findings from Canadian case law and by previous impact statement research, this Chapter is guided by a combination of the Model developed by Manikis, existing Australian law and policy, the implications of fundamental criminal justice principles discussed in Chapter 2, and the insights gained from the empirical research conducted for this thesis.

The Manikis Model focuses primarily on the content, reliability, and presentation of impact statements. These themes guide much of the remaining discussion in this Chapter.

III THE CONTENT AND RELIABILITY OF VICTIM IMPACT STATEMENTS

A Impact Statement Content

A lack of certainty as to the purpose of victim impact statements has significant ramifications for their permissible content. When viewed expressively, impact statements have no effect on the sentence of the offender. Instead, they are seen as a therapeutic tool for victims, which should assist them by providing the cathartic experience of sharing their feelings with the court. Accordingly, as discussed in Chapter 2, an expressive impact statement regime would allow

⁴⁶⁹ Ibid 114.

⁴⁶⁷ Ibid 104.

⁴⁶⁸ Ibid.

victims to write or say whatever they want in their statement, and present their statement in a variety of forms, without being constrained by rules of evidence, or fear of the content being verified via cross-examination or removed by the judge in court. Some authors believe that impact statements were always intended to be solely expressive. Erez has argued that ‘the emphasis on the VIS as an instrumental tool to inform judges in sentencing decisions has derailed the original purpose of the VIS as a vehicle for victim voice,’⁴⁷⁰ and has noted that impact statements were never intended to ‘restructure sentencing priorities.’⁴⁷¹ On the other hand, it has been suggested that if impact statements do not influence the offender’s sentence, then they fail to give real effect to the victim’s voice, and can only be viewed as ‘symbolic rather than meaningful.’⁴⁷²

In contrast, an instrumental approach views the impact statement as a tool for the judicial officer to assess the actual harm caused by the offending. This information about harm could enhance the retributive aims of sentencing, and could assist the judicial officer to address aggravating factors when sentencing. Under an instrumental approach, the content of an impact statement is treated as evidence, which means that the content must be limited to that which is both relevant and that which meets the standard of proof in the event of a challenge from the defence. According to Manikis, this approach may also limit the form in which the statement is presented. She has argued that, in order to prevent the ‘injection’ of emotion into the sentencing process, an instrumental approach may require victims to present their statement only in text or spoken word, rather than through alternative creative options.⁴⁷³

While still offering victims the opportunity to share the harm caused to them, instrumental rules that restrict the type of information that can be included in a statement, and allow for cross-examination of the victim at sentencing, can be seen as anti-therapeutic from the victim’s perspective. Several justice

⁴⁷⁰ Erez, above n 30.

⁴⁷¹ Erez, above n 92, 555.

⁴⁷² See Booth, above n 96, 61.

⁴⁷³ Manikis, above n 95, 94, 105.

professionals interviewed for this study also identified an additional anti-therapeutic problem that can arise when impact statements are approached instrumentally. This occurs when victims are asked to separate the harm caused by the acts for which the offender was convicted from the harm caused by uncharged or acquitted acts. Prosecutor Michael from Tasmania explained that this problem often occurs where, 'for example, there might be an acquittal for rape, but a conviction for indecent assault.' Under an instrumental approach, the information contained in an impact statement should address only those matters that the judge is able to take into account in sentencing. Accordingly, information about uncharged or unconvicted acts should not be included. However, many of the justice professionals interviewed shared stories of the problems that can be caused by this issue:

For example, someone is charged with a number of counts of sexual intercourse against a child across the course of a number of years, and then they offer to plead guilty, and we might take out some of the counts and have representative counts, then there may have to be some limitation in what the victim can and can't refer to in terms of the criminal acts. (Jacqui, Prosecutor, ACT)

Often an offence occurs within the context of uncharged acts. So it can be a really awkward conversation to have with someone, because you want them to be able to express what they need to say, but there are really tight guidelines. (Suzanna, Victim Support Officer, ACT)

The worst example I had was that we dealt with a situation where we did a rape trial with a young complainant and she had prepared her own victim impact statement ... It was quite traumatic. In the end, it was a not guilty verdict [for rape] but because of her age, it was a guilty verdict for unlawful sexual intercourse. She said, 'I don't want to submit [the impact statement regarding unlawful sexual intercourse] because in doing that, it's assuming that I consented, which I didn't do'. We had to say to the court that we had a victim impact statement but that we weren't going to present it because of the nature of the charges changing ... So she never really got to say how that affected her. (Robert, Witness Assistance Officer, TAS)

These quotes illustrate the great difficulties that victims experience when asked to distinguish between the harm caused by uncharged acts and the harm caused by acts for which the offender has been convicted.⁴⁷⁴ One of the victims interviewed for this research shared the frustration she felt because of her inability to convey the whole circumstances of the offending. In Jessica's case, the offender pleaded guilty to lesser offences than those which he was originally charged: 'You're not allowed to mention the crime, and you can't mention the judicial system. The plea-bargained charges do not portray the crime as it should be ... [but] of course, they don't want to hear that.'

As a solution to this problem, two justice professionals described their preference for a largely expressive approach to the content of impact statements. South Australian Witness Assistance Officer Samuel argued:

I personally think that they should be able to say what they want ... I think it's one part of the process where victims should get to have a say in the words and the way that they want to. And judges, surely, are smart enough to use their discretion to determine what is appropriate [in relation] to sentence, and what you can just take as comment.

Witness Assistance Officer Harriet from Tasmania agreed:

I wish they were allowed to say whatever they wanted. I wish they could just vent. Because the ... judge [has] the discretion to ignore certain things anyway, so I don't quite see why we need to be so strict with rules of evidence when it comes to them.

Viewing statements only as expressive, and removing rules governing their content, may at first glance appear to maximise their therapeutic benefit for the victim. However, as discussed in Chapter 2, a solely expressive approach has a major disadvantage, to both the victim and the justice system more generally, because it means that the sentencing judge has no power to use the statement

⁴⁷⁴ This issue was also identified as problematic in the findings of the recent Australian Royal Commission into Institutional Responses to Child Sexual Abuse: Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Executive Summary and Parts I-III, 102. See also New South Wales Sentencing Council, above n 29, 21.

when sentencing the offender, even if it has brought relevant aggravating factors to light. It might also prevent the fulfilment of the goal of 'just' or 'adequate' punishment, which is legislated for under all Australian sentencing regimes.⁴⁷⁵ Accordingly, it may be that under a solely expressive approach, the victim's potential for therapeutic outcomes could be limited by the fact that the judge cannot actually take the impact statement into account when sentencing.

The Manikis Model goes some way to resolving this conflict. It promotes the therapeutic benefits of victim impact statements by advocating for a largely expressive approach to their content, while still providing certain restrictive rules to ensure that statements can also be used instrumentally, without disadvantaging the offender. Under the content rules of the Model, victims are offered a great deal of flexibility in their expression.⁴⁷⁶ They are allowed the freedom to include any information about the harm they have experienced, without being limited to the harm caused by offences for which offenders were convicted. However, the model requires that 'only the actual harm suffered by the victim [in respect of the offences for which the offender is convicted] will be considered relevant to the determination of the sentence or be taken into account by the judge in crafting the sentence.'⁴⁷⁷

Because the Model offers such flexibility of expression, prosecutors, victim support, and witness assistance officers are not responsible for editing impact statements to remove information that is 'considered irrelevant to the determination of harm or the determination of the sentence,'⁴⁷⁸ as is common practice in the ACT. Instead, the judge is responsible for determining which, if any, part of the impact statement is relevant to the offender's sentence. This

⁴⁷⁵ *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a); *Sentencing Act 1995* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j); *Sentencing Act 1991* (Vic) s 5(1)(a); *Sentencing Act 1995* (WA) s 6(4)(a).

⁴⁷⁶ Manikis, above n 95, 112.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

aligns with a discussion in a recent Victorian Law Reform Commission report, which noted that:

[S]trict rules about the contents of victim impact statements limit victims' autonomy and voice. Allowing victims more freedom in what they can include in victim impact statements, and then relying on judges to take only admissible content into account, may allow victims to convey the impact of the offending more authentically.⁴⁷⁹

Under the Manikis Model, 'the judge's role [is] paramount and judges ... need to be very careful to discard the parts unrelated to [relevant] harm when crafting and deciding the severity of a sentence.'⁴⁸⁰ This approach is very similar to the Victorian DPP Prosecution Guidelines, which state that 'it is a matter for the sentencing judge to determine the admissibility of the material in a victim impact statement.'⁴⁸¹ As discussed in Chapter 3, this approach is also reflected in current judicial practice in Victoria, which was outlined by Nettle JA in *R v Swift*:

[C]ounsel appearing before sentencing judges have tended not to say a great deal about the admissibility of the contents of victim impact statements. In effect, they have left it to sentencing judges to work out which parts of a statement are admissible and may be relied upon. Such an approach is to some extent contrary to mainstream criminal practice, where the taking of objections tends to be punctilious. But it has considerable advantages ... It also accords with the observations of Charles JA in *R v Dowlan* and of Vincent JA in *DPP v DJK* that it would be destructive of the purpose of victim impact statements if their reception in evidence were surrounded and confined by the sorts of procedural rules which are applicable to the treatment of witness statements in commercial cases.⁴⁸²

⁴⁷⁹ Victorian Law Reform Commission, above n 28, 154.

⁴⁸⁰ Manikis, above n 95, 113.

⁴⁸¹ Victorian Office of Public Prosecutions, *DPP Prosecution Policies* <<http://www.opp.vic.gov.au/Resources/DPP-s-policies>> Rule 44.

⁴⁸² *R v Swift* [2007] VSCA 52 [7] (citations omitted).

Two examples of the way that Victorian judges have applied this approach in practice are the cases of *DPP v Mulhall*⁴⁸³ and *DPP v Panckow*.⁴⁸⁴ In *Mulhall*, King J acknowledged that there was extraneous information contained in the submitted victim impact statements, but still allowed the victims to read them in their entirety:

Despite the inadmissible material, four of the statements were read in their entirety and all of the documents were in fact tendered and I have read them. I have taken into account the relevant and admissible material contained therein. I have put to one side the material that is not admissible and not of any assistance for the process of assisting me in determining the appropriate sentence.⁴⁸⁵

Similarly, in *Panckow*, Cannon J explained:

In taking into account the relevant parts of the Victim Impact Statement I have also had to temper the degree of impact described, because more serious allegations are made in the course of [the impact statement] which are not the subject of any charge.⁴⁸⁶

Of these two examples, Judge Cannon's is perhaps more consistent with the principles of procedural fairness.⁴⁸⁷ While both Cannon J and King J explained that they had taken into account only the relevant and admissible materials, only Cannon J was explicit about the type of information that she was not able to take into account. In contrast, King J was less specific, and therefore less transparent, in this regard. Accordingly, Judge Cannon's approach should be preferred.

Victorian Victim Support Officer Jane has particularly noted the positive outcome of the current, flexible Victorian approach, especially when compared with the more restrictive approach of the past:

In the last couple of years, there has been a change with victim impact statements. They have become less rigid. There used to be a lot of clients who

⁴⁸³ [2012] VSC 471.

⁴⁸⁴ [2014] VCC 163.

⁴⁸⁵ *DPP v Mulhall* [2012] VSC 471 [8].

⁴⁸⁶ *DPP v Panckow* [2014] VCC 163 [17].

⁴⁸⁷ Tom R Tyler, 'Procedural Justice and the Courts' (2007) 44 *Court Review* 26.

had been distraught because they had written their statements but had to change them because the rules said that they didn't look right. But in the last two or three years, I haven't had anyone come back and say that they had to change what they wrote.

Based on the clear benefit to victims arising from current practice in Victoria, it is recommended that the other jurisdictions also adopt this approach. This will require reform of the relevant court rules in each jurisdiction. As discussed in Chapter 3, judges in the ACT have sought to rely upon prosecutors to remove extraneous information from impact statements prior to their submission.⁴⁸⁸ In contrast, but to similar effect, the *Criminal Rules* in South Australia stipulate that a judicial officer may direct that irrelevant material in an impact statement not be read out to the court.⁴⁸⁹ Similarly, under the Tasmanian Supreme Court *Criminal Rules* the judicial officer may direct the victim not to read any part of the impact statement that the court considers irrelevant to the proceedings.⁴⁹⁰

Accordingly, to apply the Manikis Model and current Victorian approach to these jurisdictions, some changes are required to both the South Australian and Tasmanian *Criminal Rules*. For example, Rule 90(7) of the South Australian *Supreme Court Criminal Rules* 2014 currently states that the Court may direct that irrelevant material in the statement not be read or taken into account. To ensure consistency with the Manikis Model and the Victorian approach, this Rule, and the equivalent Rules in the South Australian *District Court Criminal Rules* 2014 and *Magistrates Court Rules (Criminal)* 1992 should be amended to reflect the current Victorian DPP Prosecution Guidelines as follows:

It is a matter for the sentencing judge to determine the admissibility of the material in a victim impact statement. Where a victim impact statement is to be read aloud by the victim or their representative and the statement contains material likely to be regarded as inadmissible, except where the material is

⁴⁸⁸ *R v MT* [2014] ACTSC 162 [54] (Refshauge J).

⁴⁸⁹ South Australian Supreme Court *Criminal Rules* 2014, Rule 90; South Australian District Court *Criminal Rules* 2014, Rule 90; South Australian Magistrates Court *Rules (Criminal)* 1992, Rule 41.06.

⁴⁹⁰ Tasmanian Supreme Court *Criminal Rules* 2006, Part 2.

scandalous, the victim or their representative will be allowed to read the statement out in full. The court will decide, and make clear, what part of the statement, if any, it considers to be inadmissible.

The Tasmanian *Criminal Rules* should be amended to reflect the same principles. Further, the ACT *Court Procedures Rules 2006*, which are otherwise silent on this issue, should be amended to insert an equivalent rule. Judicial training may also be required to ensure that judges are aware of the new rules, so as to apply them correctly in practice. The victim impact statement guidelines in all jurisdictions will also need to be updated, including the impact statement guidelines in Victoria, which do not reflect current Victorian judicial practice.

B Impact Statement Reliability

Applying the Manikis Model to the Australian context requires consideration of how an expressive approach can be reconciled with the instrumental use of statements when issues of statement reliability and fairness to the offender arise. If the judge is able to draw adverse inferences against the offender because of the content of a statement, particularly if those adverse inferences lead to an increased sentence, it is vital that the statement be verifiable by the defence. Yet Victorian Witness Assistance Officer Hannah described cross-examination of the victim at the sentencing stage as ‘traumatic,’ while South Australian Witness Assistance Officer Samuel described it as ‘distressing’ and ‘difficult.’ Under a therapeutic jurisprudence approach, it is crucial that steps be taken to limit the possibility that victims become re-traumatised by the justice process, including through cross-examination on the content of their impact statement.

Under the Model, Manikis describes the balance between expressive and instrumental approaches to statement reliability as an equilibrium.⁴⁹¹ The Model allows for cross-examination of victims on their statements, but introduces certain rules to reduce the likelihood of victims being re-traumatised, because ‘a offender’s “right” to cross-examination should not justify using methods and

⁴⁹¹ Manikis, above n 95, 115.

techniques known to confuse or mislead' victims.⁴⁹² These rules stipulate that 'if cross-examination takes place, victims would need to be treated with courtesy and respect.'⁴⁹³ Additionally, victims 'with specific needs should also benefit' from vulnerable witness provisions.⁴⁹⁴

Once again, Victorian practice is largely consistent with the Model. Under the *Sentencing Act 1991* (Vic),⁴⁹⁵ if the victim is to be cross-examined on their statement, arrangements can be made for this to occur under vulnerable witness provisions. However, unlike the Manikis Model, the Victorian rules adhere more closely to a therapeutic jurisprudence approach because they apply to all victims who present statements, not just those with 'specific needs.' In contrast, the sentencing legislation in the other jurisdictions does not make clear that vulnerable witness provisions apply in this situation. This is not to say that vulnerable witness provisions cannot be invoked during cross-examination of victims about their impact statements in the ACT, South Australia and Tasmania, but rather that their legislation is not as clear in specifying the existence of this right. In order to achieve uniformity with the more therapeutic Victorian approach, similar legislative provisions should be adopted in the ACT, South Australia, and Tasmania.

All four research jurisdictions go beyond the Manikis Model to offer additional levels of protection for victims who may be subject to cross-examination on their impact statement. First, the *Crimes (Sentencing) Act 2005* (ACT),⁴⁹⁶ *Evidence Act*

⁴⁹² Phoebe Bowden, Terese Henning and David Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37 *Melbourne University Law Review* 538, 560-561.

⁴⁹³ Manikis, above n 95, 115.

⁴⁹⁴ Manikis, above n 95, 115. See also Tom R Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283, 298.

⁴⁹⁵ *Sentencing Act 1991* (Vic) s 8S. This provision is distinct from section 8R, which provides that victims may use vulnerable witness provisions when presenting their statements. That is, the *Sentencing Act 1991* (Vic) leaves no doubt as to the victim's right to be protected via vulnerable witness provisions at all points during the impact statement process.

⁴⁹⁶ *Crimes (Sentencing) Act 2005* (ACT) 53(4).

1929 (SA),⁴⁹⁷ *Evidence (Children and Special Witnesses) Act 2001* (Tas)⁴⁹⁸ and *Criminal Procedure Act 2009* (Vic)⁴⁹⁹ all prevent unrepresented offenders from cross-examining victims. This should ensure that when cross-examination does occur, it is undertaken only by legal practitioners, whose duty to the court prohibits the use of aggressive tactics.⁵⁰⁰ Secondly, in order to further minimise the possibility of aggressive or upsetting cross-examination, the *Evidence Act 2011* (ACT),⁵⁰¹ *Evidence Act 1929* (SA),⁵⁰² *Evidence Act 2001* (Tas),⁵⁰³ and *Evidence Act 2008* (Vic)⁵⁰⁴ all require the court to disallow ‘improper’ or ‘inappropriate’ questions under the ‘section 41 rules.’ This includes questions that are confusing, offensive, intimidating, humiliating, insulting or repetitive.

However, it appears that the existing protective provisions and measures may not go far enough. A number of researchers have identified that the section 41 rules are difficult to apply in practice, and consequently provide only weak protection from inappropriate cross-examination.⁵⁰⁵ Accordingly, this thesis contends that further protections are required, and that these should be incorporated into the victim-focused pre-sentence hearing proposed by Chapter 5. In that Chapter, it was argued that this type of hearing would allow judicial

⁴⁹⁷ *Evidence Act 1929* (SA) s 13B.

⁴⁹⁸ *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8A.

⁴⁹⁹ *Criminal Procedure Act 2009* (Vic) s 356.

⁵⁰⁰ D A Ipp, ‘Lawyers’ Duties to the Court’ (1998) 114 *Law Quarterly Review* 63, 63.

⁵⁰¹ *Evidence Act 2011* (ACT) ss 41(1)-(2).

⁵⁰² *Evidence Act 1929* (SA) s 25.

⁵⁰³ *Evidence Act 2001* (Tas) ss 41(1)-(2).

⁵⁰⁴ *Evidence Act 2008* (Vic) ss 41(2)-(3).

⁵⁰⁵ See Justice James Wood, ‘Child Witnesses: The New South Wales Experience’ (Paper presented at Child Witnesses — Best Practice for Courts Conference, Parramatta, July 2004) 4; Judy Cashmore and Lily Trimboli, ‘An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot’ (Research Report, New South Wales Bureau of Crime Statistics and Research, 2005) 51-56; Justice Roy Ellis, ‘Judicial Activism in Child Sexual Assault Cases’ (Paper presented at the National Judicial College of Australia Children and the Courts Conference, Sydney, November 2005) [35]; Russell Boyd and Anthony Hopkins, ‘Cross-Examination of Child Sexual Assault Complainants: Concerns About the Application of s 41 of the Evidence Act’ (2010) 34 *Criminal Law Journal* 149; Terese Henning, ‘Obtaining the Best Evidence from Children and Witnesses with Cognitive Impairments — “Plus ça Change” or Prospects New?’ (2013) 37 *Criminal Law Journal* 155.

officers to make clear what information from the impact statement would be relied on in passing sentence, and would allow the prosecution to make submissions about any matters in the statement that the victim would prefer not to be expressly mentioned in the sentencing remarks. Such a hearing would also, in accordance with the findings of this Chapter, enable the defence to raise relevant issues with the content of the impact statement, and consequently identify any intention to cross-examine the victim on their statement. If such an intention were expressed, the proposed hearing would help to settle the questions to be asked in cross-examination, and act as an additional safeguard to ensure that the section 41 rules are not breached. This proposal is not without precedent: pilot testing of ‘ground rules’ hearings commenced across a number of UK courts in 2014,⁵⁰⁶ and in 2017 it was announced that these arrangements would be rolled out nationwide.⁵⁰⁷

IV TIMEFRAMES FOR COMPLETING VICTIM IMPACT STATEMENTS

As noted in Chapter 3, legislation and policy documents in the ACT and Tasmania do not contain suggested timeframes for the preparation of impact statements. In contrast, South Australia and Victoria provide more specific guidance. The Victorian Guide to Victim Impact Statements states that an impact statement ‘should not be given to police or prosecutors until someone is found guilty or pleads guilty to a crime,’⁵⁰⁸ while the South Australian DPP Prosecution Policy says that the statement ‘should be prepared prior to sentencing submissions.’⁵⁰⁹ The legislation in those jurisdictions also requires that a written copy of the

⁵⁰⁶ Scottish Court Service, *Evidence and Procedure Review Report* (March 2015) 19.

⁵⁰⁷ Tim Shipman and Tom Harper, ‘Rape Victims to be Spared Court Ordeal’ *The Times* (online) 19 March 2017 <<https://www.thetimes.co.uk/edition/news/rape-victims-to-be-spared-court-ordeal-q2nd8d29t>>.

⁵⁰⁸ Victorian Government Department of Justice and Regulation, *Victim Impact Statements in Victoria* <<http://www.victimsofcrime.vic.gov.au/home/going+to+court/victim+impact+statements>>.

⁵⁰⁹ South Australian Office of the Director of Public Prosecutions, *Prosecution Policy and Guidelines* <<http://www.dpp.sa.gov.au/publications/prosecution-policy-guidelines>>, Guideline 13.

impact statement be provided to the court and the offender prior to the sentencing hearing.⁵¹⁰

Problems around timeframes for completing statements were raised by a number of justice professionals interviewed in South Australia and Tasmania. Prosecutor Michael and Witness Assistance Officer Robert explained that in Tasmania, sentencing of the offender usually occurs very quickly after conviction, 'sometimes on the same day.' Further, in South Australia, the recently superseded DPP Prosecution Policy⁵¹¹ indicated that impact statements should be prepared before arraignment.⁵¹² Accordingly, South Australian victims were previously required to prepare their statements very early in the justice process, and Tasmanian victims are currently required to prepare them prior to the offender's conviction.

This approach is actually consistent with the Manikis Model, which promotes early disclosure of the impact statement to allow offenders time to assess the statement's reliability.⁵¹³ Yet the interviewed justice professionals revealed that this practice can cause problems. First, it can be problematic if a statement of harm is requested before the victim has had the chance to reflect on the harm caused. As Witness Assistance Officer Samuel explained in relation to the earlier South Australian policy, 'I don't think people know what the impact is straight after an offence. I think [impact statements] are requested too early in the process.' Secondly, if an early statement is requested prior to conviction, it is possible that the statement may be redundant because of a total acquittal. Samuel found this idea particularly worrying, arguing that 'it's disrespectful to ask for victim impact statements from people if [they] may not be used.' Victorian Witness Assistance Officer Hannah agreed, stating 'if there is a not

⁵¹⁰ South Australian Supreme Court *Criminal Rules* 2014, Rule 90; South Australian District Court *Criminal Rules* 2014, Rule 90; South Australian Magistrates Court *Rules (Criminal)* 1992, Rule 41.06; *Sentencing Act 1991* (Vic) s 8N.

⁵¹¹ This policy was current at the time of the South Australian interviews, which were conducted in 2015.

⁵¹² The earlier Policy is no longer available online. A copy is on file with the author.

⁵¹³ Manikis, above n 95, 115.

guilty verdict, it would be pretty horrible to have poured out your heart into a victim impact statement, but not be able to submit it.'

Accordingly, it is not recommended that this aspect of the Manikis Model be adopted in the Australian context. Instead, it is appropriate that victims submit their statement only once they have had time to process the harms caused by the offending, and after they have been made aware that the offender has actually been convicted. This requires a change to current Tasmanian court procedure. To allow victims time to complete their statement, and then to disclose the statement to defence prior to the sentencing hearing, it is recommended that sentencing hearings in Tasmania be scheduled within a few days, rather than a few hours, of the offender being found guilty.⁵¹⁴

V THE PRESENTATION OF VICTIM IMPACT STATEMENTS

A Impact Statement Form

The Manikis Model emphasises the expressive purpose of impact statements, but does not extend this beyond the content of these statements.⁵¹⁵ It rejects the current approach to impact statement submission in the ACT and Victoria,⁵¹⁶ where victims are allowed to present their statement in a number of ways, including through poems, drawings and/or songs. As mentioned previously, Manikis has argued that restrictions in form may be required to prevent the 'injection' of emotion into the sentencing process.⁵¹⁷ However, this restriction is not actually required by the fundamental principles of criminal justice explored in Chapter 2. Furthermore, Victorian Victim Support Officer Jane has explained the therapeutic benefits of offering presentation flexibility to victims: 'we know that people don't always express verbally. They could express through a piece of

⁵¹⁴ A sentencing hearing that occurs within a few days, rather than a few hours of the finding of guilt, is not inconsistent with sentencing practices in other jurisdictions, and should not cause a protracted period of delay that could interfere with the rights of any offender who may be in custody.

⁵¹⁵ Ibid 114.

⁵¹⁶ *Crimes (Sentencing) Act 2005* (ACT) s 58; *Sentencing Act 1991* (Vic) s 8L.

⁵¹⁷ Manikis, above n 95, 94, 105.

artwork. I know for a lot of people, that is how they communicate, and that's really powerful.'⁵¹⁸ Accordingly, this is another aspect of the Manikis Model that should not be adopted by any Australian jurisdiction. It is instead recommended that the South Australian and Tasmanian sentencing legislation, which allow only for written statements,⁵¹⁹ be amended to conform with the current ACT and Victorian approaches.

B Verbal Submission of Statements

Under the Manikis Model, victims are allowed to read their written statement aloud if that is their wish. Previous research has found that this provides some victims with a sense of power or strength,⁵²⁰ which demonstrates the benefits of this approach from a therapeutic jurisprudence perspective. Several of the justice professionals interviewed agreed, arguing that statements are most powerful when read by victims personally. This notion of power can be understood within the context of victims' identified justice needs. Three justice professionals particularly identified that victims' needs for participation and voice, including the need to share their experience in a public setting, can be met by verbal presentation of their statement:

[Victims] have all reported that they have found that a therapeutically useful thing ... to tell their truth publicly about something they have had to be silent about for many years of their life. (Alisa, Victim Support Officer, VIC)

[Reading their statement out loud is] validating for the victim. No matter what the outcome, they have had their opportunity to tell people [about the harm caused by the offending] ... So I think it is more powerful in that way for clients. (Jane, Victim Support Officer, VIC)

It's a very therapeutic thing to do ... Up until that point, the whole court is focused on finding someone accountable for breaking the law ... whether it be driving down the street too fast, or whether it be the rape of a child, the matter is

⁵¹⁸ The accessibility of victim impact statements for victims with low literacy levels was also identified as an issue by Meredith and Paquette, above n 30, 26.

⁵¹⁹ *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Sentencing Act 1997* (Tas) s 81A.

⁵²⁰ Victorian Victim Support Agency, above n 31, 30.

focused on holding an offender accountable. It's not until that point that the whole court and the whole system becomes focused on 'who is this person?' (Clare, Victim Support Worker, TAS)

Some justice professionals also identified that, in addition to meeting victims' needs for participation and voice, victims' need for control over their experience of the justice process can be met through verbal presentation:

There's always something very powerful and cathartic to see people go into court, stare at the accused and say in their own authentic words what the impact is. (Samuel, Witness Assistance Officer, SA)

Some people feel really empowered reading out their victim impact statement ... some people feel like they are regaining control in facing their offender, that the power is reversed. They are telling the accused how it has affected their life, and it can be really powerful for them in their healing and recovery. (Hannah, Witness Assistance Officer, VIC)

Two of the victims interviewed confirmed the benefits they gained from reading their statement aloud. According to August:

I was so, so nervous. I got up there and I was confident in my brain but my body was just freaking out. I did get my wits about me as I got to the second paragraph. And did it exactly how I wanted to. And because I was able to do it how I wanted to, I felt so good after. I think I felt better after reading that out than when being at sentencing and getting the end result. It was so empowering. (August, Victim, SA)

August described the power she felt as a result of reading the statement aloud, which clearly met her needs for participation, voice and control. These needs were achieved because she was allowed to present her statement 'how [she] wanted to.'

Jessica had a similar experience. In addition to fulfilling her needs for participation and voice, she explained the sense of control she gained by presenting her own statement to the court:

I wanted to do it. I know what happened. It was written by me. I wanted it to be expressed by me, the way that it should be expressed, not read out by someone else ... I am [glad I read it out loud] ... I paced myself as I read it aloud, and I got through it without a hitch, although I did begin to cry at one point and stopped momentarily to blow my nose and compose myself before continuing. Other than my voice, you could have heard a pin drop in that room. I felt in total control, and was told later by my team that the delivery of my victim impact statement was extremely powerful. (Jessica, Victim, SA)

These findings confirm the therapeutic benefits of offering victims the choice to present their statements verbally. Significantly, the choice to do so is already allowed under all jurisdictions' sentencing regimes,⁵²¹ and consequently no legislative amendments are required in any of the research jurisdictions.

C Written Submission of Statements

Not all victims choose to present their statement verbally. Witness Assistance Officer Samuel from South Australia explained that 'some people just want the impact known, but they don't want to go to court for the submissions on sentence.' Victim Support Officer Andie from Victoria similarly noted that:

For some victims ... there is no physical way they could read a single word out, but they do want their feelings heard. So, it's empowering for them [to submit it in writing].

Accordingly, as Andie explained, it is possible for victims' needs for participation, voice, and control to be met by written submission of their statement, as well as by verbal presentation. However, the two victims interviewed for this thesis who chose not to read their statement aloud did not categorise this choice as empowering. For victims Laura from South Australia and Emily from Tasmania, this choice was made because the idea of reading their statement in front of the offender was too overwhelming. Laura explained that 'I didn't really want to read it out in court; I didn't want him to look at me. So, I asked for it to be read out for

⁵²¹ *Crimes (Sentencing) Act 2005* (ACT) s 50; *Criminal Law (Sentencing) Act 1988* (SA) s 7A(3); Tasmanian Supreme Court, *Criminal Rules* 2006 Pt 2 (6); *Sentencing Act 1991* (Vic) s 8Q(1).

me.’ Laura’s experience demonstrates the benefits of arrangements allowing the statement to be read aloud by a person other than the victim, as is current practice in all of the research jurisdictions.⁵²² In contrast, Emily chose to submit her statement in writing, after finding that: ‘I tried one night to read it out loud, and I think I got half way through the first paragraph, and it was just tears. I couldn’t speak at all.’

D Presentation Using Vulnerable Witness Provisions

A solution to address the problem of victim concern about presenting their statement in the presence of the offender is to ensure that all victims are given the option to present their statement using the entire range of vulnerable witness provisions.⁵²³ These provisions are already available to some extent in each of the research jurisdictions. For example, the *Crimes (Sentencing) Act 2005* (ACT) allows for victims of sexual offences to present their impact statements via audio-visual link from a remote facility.⁵²⁴ The *Evidence (Miscellaneous Provisions) Act 1991* (ACT)⁵²⁵ further says that if the victim is likely to suffer severe emotional trauma because of the nature of the offence, the victim may present their statements in a closed court,⁵²⁶ or in court with the protection of a screen,⁵²⁷ and have a support person present during the presentation.⁵²⁸ The *Criminal Law (Sentencing) Act 1988* (SA) also allows for the presentation of an impact statement via CCTV, in court with the protection of a screen, or in a closed court, if the court believes that there is ‘good reason to do so.’⁵²⁹ The *Evidence (Children and Special Witnesses) Act 2001* (Tas) may allow the victim to be declared a special witness, if the court determines that it is likely that the victim

⁵²² *Crimes (Sentencing) Act 2005* (ACT) s 51(3); *Criminal Law (Sentencing) Act 1988* (SA) s 7A; Tasmanian Supreme Court, *Criminal Rules 2006*; *Sentencing Act 1991* (Vic) s 8Q.

⁵²³ The Manikis Model does not address this issue at all.

⁵²⁴ *Crimes (Sentencing) Act 2005* (ACT) s 52(4)(b).

⁵²⁵ *Evidence (Miscellaneous Provisions) Act 1991* (ACT) 38(2)(c).

⁵²⁶ *Ibid* s 39(3).

⁵²⁷ *Ibid* s 38C(3).

⁵²⁸ *Ibid* s 38E(3).

⁵²⁹ South Australian Office of the Director of Public Prosecutions, *Vulnerable Witness Provisions* <<http://www.dpp.sa.gov.au/was/witnesses/vulnerable-witness-provisions-vwps>>.

may experience emotional trauma because of the subject matter of the evidence given, or be so distressed as to be unable to give evidence satisfactorily.⁵³⁰ In such circumstances, the victim may be permitted to give evidence in a closed court, or via audio-visual link, or via a pre-recorded video.⁵³¹ Finally, the options available under the *Sentencing Act 1991* (Vic) include allowing the victim to present his or her statement via CCTV from a remote facility, obscuring the victim's view of the offender during presentation of the statement, allowing a support person to stand beside the victim while they read their statement to the court, closing the court or restricting those who can be present in the courtroom while the statement is being read, and requiring lawyers not to be robed during presentation.⁵³²

ACT prosecutor Jacqui particularly emphasised that remote facility CCTV arrangements 'work well,' and Witness Assistance Officer Hannah from Victoria explained their usefulness in sexual offence cases specifically:

[Remote facilities] are great because ... most accused for sexual offences are on bail. So, on breaks, or walking through the front door of the court, there is the risk of bumping into them, which defeats the purpose. So, having the offsite ones is great. Just for [the victim] not to have to see the accused, and just see the judge and the barristers. Most victims choose that option.

The Victorian legislation provides the most extensive range of options for vulnerable witnesses. In accordance with a therapeutic jurisprudence approach, the full range of vulnerable witness arrangements should also be provided to victims in the other jurisdictions. These should be offered to all victims who wish to present their impact statements verbally, not only where the court determines that there is 'good reason to do so,' or where the victim might suffer severe emotional trauma by reading the statement aloud.⁵³³

⁵³⁰ *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8(1)(b).

⁵³¹ *Ibid* s 8(2).

⁵³² *Sentencing Act 1991* (Vic) s 8R(1).

⁵³³ Similarly but to lesser effect, in August 2017, the *Justice Legislation Amendment Act 2017* (NSW) amended the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A to

The need to amend these arrangements can be demonstrated by the case of Tasmanian victim Eve. She was the only victim interviewed for this research who had a negative experience of presenting her impact statement verbally, and it is clear that this experience occurred because vulnerable witness provisions were not invoked for the presentation of her statement. While Eve 'liked doing [her statement] to [the offender's] face,' she was perturbed by the presence of the media in the courtroom, stating: 'I didn't want the media and other unnecessary people. There was just no benefit to the community [for the media to be present].' Tasmanian Witness Assistance officer Robert agreed that 'some people like [to have their statement handed up to the judge and not read out] because they don't want everyone to hear it, particularly the media.'

Eve's dilemma, and those of the victims referred to by Robert, could have been easily resolved if the courtroom had been closed while the impact statements were read. However, the *Evidence (Children and Special Witnesses) Act 2001* (Tas) enables this to occur only where it is likely that the victim may experience 'emotional trauma'⁵³⁴ because of the subject matter of the evidence given, or be 'so distressed as to be unable to give evidence satisfactorily.'⁵³⁵ It may well be that the prosecutor responsible for the case did not believe that Eve met the threshold to access the vulnerable witness provisions under the *Special Witnesses Act*. Under the solution proposed by this thesis, vulnerable witness provisions should always be offered to victims who wish to read their statement aloud; accordingly, victims such as Eve should not be affected by the unwanted presence of the media or others in the courtroom while presenting their statements.

provide that all victims of prescribed sexual offences must be allowed to read their statement in a closed court unless the court directs otherwise.

⁵³⁴ *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8(1).

⁵³⁵ *Ibid.*

VI SUMMARY OF THE PROPOSED AUSTRALIAN MODEL

This Chapter has proposed a number of solutions to resolve the pervasive uncertainty in Australia around the purpose and function of victim impact statements. These solutions modify and expand on the Canadian Model developed by Manikis. Table 6.2 compares and contrasts the Manikis Model with the model proposed in this Chapter. Table 6.3 then clarifies the changes that have been proposed to policy and legislation across the research jurisdictions as a consequence of the findings in this Chapter.

Table 6.2: Comparison of the Manikis Model and the Proposed Australian Model

Issue	The Manikis Canadian Model	The Proposed Australian Model
1. Clarity Lack of clarity around the function and purpose of impact statements	The Manikis Model values both the instrumental and expressive functions of impact statements.	The proposed Australian model values both the instrumental and expressive functions of impact statements.
2. Content The permissible content of impact statements	Impact statements can contain any information the victim wishes to include, but only the actual harm caused to the victim will be considered relevant to the determination of sentence. It is the responsibility of the judicial officer to discard irrelevant information when sentencing the offender.	Impact statements can contain any information the victim wishes to include, but only the actual harm caused to the victim as a consequence of the offending will be considered relevant to the determination of sentence. It is the responsibility of the judicial officer to discard irrelevant information when sentencing the offender and to make it clear in the sentencing remarks that this has been done.
3. Form The permissible form of the impact statement	Victims can present their statement only in writing.	Victims can present their statement in a variety of forms, including in writing, verbally, in poems, drawings and/or songs.

Issue	The Manikis Canadian Model	The Proposed Australian Model
<p>4. Cross-examination</p> <p>The permissibility of cross-examining victims on their impact statement</p>	<p>Victims can be cross-examined on the content of their impact statement. However, those with specific needs can only be cross-examined under vulnerable witness provisions.</p>	<p>Victims can be cross-examined only under vulnerable witness provisions. In any case where the victim is to be cross-examined on their impact statement, a pre-sentence hearing should settle the questions that will be permitted. An unrepresented offender must never be allowed to conduct this cross-examination, and the judge must disallow any and all improper questions.</p>
<p>5. Timeframes</p> <p>The timeframes for preparation of the impact statement</p>	<p>Early disclosure of the impact statement to the defence is required.</p>	<p>The impact statement should be submitted only if/when the offender has been found guilty.</p>
<p>6. Presentation</p> <p>The permissible methods for impact statement presentation</p>	<p>Victims may present their statement verbally to the court.</p>	<p>Victims may present their written statement verbally to the court, or it may be presented verbally by another person of the victim's choosing.</p> <p>Victims should always be offered the option to present their statement using the full range of vulnerable witness provisions.</p>

Table 6.3: Summary of Changes Required Across the Research Jurisdictions Under the Proposed Australian Model

Proposed Australian Model	Policy or legislation requiring change in the ACT	Policy or legislation requiring change in South Australia	Policy or legislation requiring change in Tasmania	Policy or legislation requiring change in Victoria
1. Content The impact statement can contain any information the victim wishes to include, but only the actual harm caused to the victim will be considered relevant to the determination of sentence. It is the responsibility of the judicial officer to discard irrelevant information when sentencing the offender and to make it clear in sentencing remarks that this has been done.	The ACT <i>Court Procedures Rules 2006</i> are silent on this issue. They require amendment to introduce this rule. The ACT impact statement guidelines also need to be updated.	The South Australian <i>Supreme Court Criminal Rules 2014</i> , District Court <i>Criminal Rules 2014</i> and <i>Magistrates Court Rules (Criminal) 1992</i> require amendment to reflect the proposed rule. The South Australian impact statement guidelines also need to be updated.	The Tasmanian <i>Criminal Rules</i> require amendment to reflect the proposed rule. The Tasmanian impact statement guidelines also need to be updated.	No change to the legislation is required, as the proposal is consistent with the current Victorian approach. The Victorian impact statement guidelines need to be updated as they do not reflect current Victorian practice. ⁵³⁶
2. Form Victims can present their statement in a variety of forms, including in writing,	No change to legislation or policy is required, as the proposal is consistent with the current ACT approach.	The South Australian sentencing legislation allows victims to present statements only in prose.	The Tasmanian sentencing legislation allows victims to present statements only in prose. Amendments are	No change to legislation or policy is required, as the proposal is consistent with the current Victorian

⁵³⁶ See Victorian Government Department of Justice and Regulation, *Victim Impact Statements in Victoria* <<http://www.victimsofcrime.vic.gov.au/home/going+to+court/victim+impact+statements>>.

Proposed Australian Model	Policy or legislation requiring change in the ACT	Policy or legislation requiring change in South Australia	Policy or legislation requiring change in Tasmania	Policy or legislation requiring change in Victoria
verbally, in the form of a recording, poems, drawings and/or songs.		Amendments are therefore required to reflect the current ACT and Victorian approach.	therefore required to reflect the current ACT and Victorian approach.	approach.
3. Cross-examination Victims can be cross-examined only under vulnerable witness provisions. In any case where the victim is to be cross-examined on their impact statement, a pre-sentence hearing should settle the questions that will be permitted. An unrepresented offender must never be allowed to conduct this cross-examination, and the judge must disallow any and all improper questions.	Changes to the legislation are required to make clear that victims can be cross-examined over the content of their impact statement only under vulnerable witness provisions. Existing legislation already prevents an unrepresented offender from cross-examining the victim, and requires the judge to disallow any and all improper questions. However, new court rules are required to implement the proposed victim-focused pre-sentence hearing, which will facilitate the settlement of	Changes to the legislation are required to make clear that victims can be cross-examined over the content of their impact statement only under vulnerable witness provisions. Existing legislation already prevents an unrepresented offender from cross-examining the victim, and requires the judge to disallow any and all improper questions. However, new court rules are required to implement the proposed victim-focused pre-sentence hearing, which will facilitate the settlement of	Changes to the legislation are required to make clear that victims can be cross-examined over the content of their impact statement only under vulnerable witness provisions. Existing legislation already prevents an unrepresented offender from cross-examining the victim, and requires the judge to disallow any and all improper questions. However, new court rules are required to implement the proposed victim-focused pre-sentence hearing, which will facilitate the settlement of	No change to legislation or policy regarding cross-examination of victims over their impact statement is required, as the proposal is consistent with current Victorian practice. Existing legislation already prevents an unrepresented offender from cross-examining the victim, and requires the judge to disallow any and all improper questions. However, new court rules are required to implement the proposed victim-focused pre-sentence hearing, which will facilitate the settlement of

Proposed Australian Model	Policy or legislation requiring change in the ACT	Policy or legislation requiring change in South Australia	Policy or legislation requiring change in Tasmania	Policy or legislation requiring change in Victoria
	cross-examination questions.	cross-examination questions.	cross-examination questions.	cross-examination questions.
4. Timeframes The impact statement should be submitted only if/when the offender has been found guilty.	ACT policy is currently silent on this issue. Accordingly, a policy may need to be developed to address this issue.	No change to legislation or policy is required, as the proposal is consistent with current South Australian practice.	Tasmanian courts schedule sentencing hearings within hours or days following conviction. This practice should be modified to prevent the hearing of sentencing submissions immediately following the finding of guilt. Tasmanian victims should be given time to prepare and/or finalise, and then disclose, their statement once the offender has been convicted.	No change to legislation or policy is required, as the proposal is consistent with current Victorian practice.
5. Presentation Victims may present their written statement verbally to the court, or it may be presented verbally by another person of the victim's choosing.	Some change to legislation or policy is required. Victims are already allowed to present their statement verbally or have it read by the court. However, the relevant legislation allows victims to present their	Some change to legislation or policy is required. Victims are already allowed to present their statement verbally or have it read by another person of the victim's choosing. However, the relevant legislation	Some change to legislation or policy is required. Victims are already allowed to present their statement verbally or have it read by the court. However, the relevant legislation allows victims to present their	No change to legislation or policy is required, as the proposal is consistent with the current Victorian approach.

Proposed Australian Model	Policy or legislation requiring change in the ACT	Policy or legislation requiring change in South Australia	Policy or legislation requiring change in Tasmania	Policy or legislation requiring change in Victoria
Victims should always be offered the option to present their statement using the full range of vulnerable witness provisions.	statement using some vulnerable witness provisions only if they are declared to be likely to suffer severe emotional trauma because of the nature of the offence. This must be amended to allow all victims the right to present their statement via all vulnerable witness provisions.	allows victims to present their statement using some vulnerable witness provisions only if 'there is good reason to do so.' This must be amended to allow all victims the right to present their statement via all vulnerable witness provisions.	statement using some vulnerable witness provisions only if they are declared to be likely to suffer severe emotional trauma because of the nature of the offence. This must be amended to allow all victims the right to present their statement via all vulnerable witness provisions.	

VII CHOOSING NOT TO SUBMIT AN IMPACT STATEMENT

As discussed in Chapters 3 and 5, the absence of a victim impact statement does not prevent a judicial officer from taking into account the effects of the crime on the victim. Even without a statement, a judicial officer will usually be aware of the possible effects of the offending upon the victim. Because only those who had completed statements were interviewed for this research, empirical data were not obtained from victims on the possible reasons why they had declined to engage in this process.

Previous research suggests that impact statements are generally submitted only in a minority of cases.⁵³⁷ These tend to be cases where the victim has 'sustained serious harm'⁵³⁸ such as sexual assault.⁵³⁹ It has also been suggested that women are more likely to submit statements than men.⁵⁴⁰ These issues were touched on by a number of justice professionals interviewed for this study. In contrast to previous research findings, they suggested that sexual assault victims may be less likely to submit statements than victims of other types of offences, due to the complexity of harm experienced by such victims. For example, according to Tasmanian Prosecutor Michael, 'I've had rape victims who have said, "I don't want that person to know what he has done to me, and what effect he has had on me."' Similarly, Victorian Witness Assistance Officer Hannah said that 'some people choose not to write one, so they don't give the accused the satisfaction of knowing how [the offending] has affected them.'

⁵³⁷ Julian V Roberts, 'Crime Victims, Sentencing, and Release from Prison' in Joan Petersilia and Kevin R Reitz (eds), *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press, 2012) 109. Roberts summarised findings from a range of studies indicating that impact statements are submitted in somewhere between 14 and 42 per cent of cases.

⁵³⁸ Paul G Cassell and Edna Erez, 'Victim Impact Statements and Ancillary Harm: The American Perspective' (2011) 15 *Canadian Criminal Law Review* 149, 155.

⁵³⁹ Department of Justice Canada, *Multi-Site Survey of Victims of Crime and Criminal Justice Professionals across Canada: Summary of Probation Officer, Corrections, and Parole Board Respondents* (Policy Centre for Victim Issues, 2005) 10.

⁵⁴⁰ Erez, Ibarra and Downs, above n 4, 27.

In some circumstances, the overwhelming experience of being involved in the justice system may also deter sexual offence victims from participating at sentencing. Tasmanian Witness Assistance Officer Harriet identified criminal justice fatigue as a reason for victims' choice not to submit statements following a trial:

I have found, if you get a guilty verdict from the jury, you can find it difficult to convince a person to then sit down and write about it, because they're over it, and they're exhausted. They've done their bit, and they've got the result that they want, and it sometimes doesn't seem for them that important to say more.

Not only do these findings contrast with previous research, but this perspective is strikingly different from that of, for example, South Australian victim August, who said that she viewed her impact statement as 'a chance to have a bit of power, and stand up and have my say.' The views of the quoted justice professionals are also not reflected by the dataset of sentencing remarks analysed in Chapter 5. As is identified by the table in Appendix 2, victim impact statements were submitted in at least 79 of the 100 cases analysed, which suggests that most victims of sexual offending do submit impact statements, at least in Australia.

Regardless, Michael and Hannah's words show that choosing not to submit a statement may also be an empowering choice for victims — especially where that choice allows victims to maintain control over their personal information. This view is supported by South Australian Witness Assistance Officer Samuel, who said that 'a victim not doing a victim impact statement can be as powerful [for the victim] as them choosing to do one.' In addition, Harriet noted in her example of victim fatigue that 'they've done their bit and they've got the result that they want.' The notion that they have 'got the result that they want' may also be a comfort to victims who have found vindication in the verdict itself. This might reduce their need for the therapeutic benefits that could be derived from submitting a statement.

These findings are not the result of a comprehensive examination of this issue. The justice professionals interviewed suggest that victims' reasons for not completing an impact statement may be varied and deeply personal, and do not appear to be the consequence of any structural or systemic problem. However, it is hoped that if impact statement processes and procedures are modified in accordance with the model recommended by this Chapter, victims' increased understanding of the nature and purpose of their statements may make the choice to prepare one more appealing or accessible. This could be beneficial to the victim as a cathartic or therapeutic experience, as well as to the wider community, through judges' increased ability to impose proportionate sentences, and to comply with statutory requirements to recognise the victim when sentencing.

VIII CONCLUSION AND RECOMMENDATIONS

The interviews undertaken for this thesis were designed to achieve a better understanding of sexual offence victims' perspectives of impact statement and sentencing processes and procedures across the ACT, South Australia, Tasmania and Victoria. These interviews raised two significant problems, the first of which is the lack of clarity around the purpose of victim impact statements. This problem is not limited to Australian jurisdictions. Manikis found that similar issues arise under Canadian impact statement regimes. In response, she developed a Model to address these inconsistencies. This Chapter has used the interview findings to develop an adapted and expanded form of this Model for the Australian context. Notably, the solutions proposed in this Chapter are largely consistent with current Victorian practice. Accordingly, other Australian jurisdictions can look with confidence to the precedent set by Victoria when reforming their impact statement laws and procedures.

In regard to statement content, this Chapter proposes an expressive approach, while maintaining certain rules to ensure that statements can also be used instrumentally and without disadvantaging the offender. Under this approach, victims are offered a great deal of flexibility in their expression and in the form of

their statement. They are allowed the freedom to include any information about the harm they have experienced, without this being limited to the harm caused only by the offences for which offenders have been convicted. However, only the actual harm experienced as a consequence of the offending will be considered relevant to the judge's determination of sentence.

Under this approach, prosecutors, victim support, and witness assistance officers are not responsible for editing impact statements to remove information that is considered irrelevant to the determination of harm or the determination of the sentence. Instead, the judicial officer is responsible for deciding which, if any, parts of the impact statement are relevant to the offender's sentence, and make clear both that and how they have done so. This approach is consistent with current Victorian judicial practice, but its implementation requires amendments to the court rules in other jurisdictions.

In regard to the reliability of statements, this Chapter recommends a balance between expressive and instrumental approaches. If the judicial officer is able to draw adverse inferences against the offender because of the content of an impact statement, particularly if those adverse inferences lead to an increased sentence, it is vital that the content of a statement be verifiable by the defence. However, under a therapeutic jurisprudence approach it is crucial that victims not be re-traumatised by the process of cross-examination. Therefore, if cross-examination takes place, victims need to be treated with courtesy and respect and they must be offered the opportunity to use vulnerable witness provisions.

The findings of this Chapter further support the recommendation made in Chapter 5 regarding the introduction of a victim-focused pre-sentence hearing. This type of hearing would allow the judicial officer to make clear what information from the impact statement would be relied on in passing sentence, and would allow the prosecution to make submissions about any matters in the statement the victim would not like to be expressly mentioned in the sentencing remarks. It could further enable the defence to raise issues, if any, with the content of the impact statement, and consequently to identify any intention to

cross-examine the victim on their statement. If such an intention were expressed, the proposed hearing would facilitate the settlement of the questions to be asked in cross-examination. This would act as an additional safeguard to ensure that victims are not re-traumatised by the process of cross-examination.

In regard to statement presentation, this Chapter recommends flexibility in the form that impact statements may take, including the use of prose, poems, drawings, and/or songs. This approach is consistent with current sentencing legislation in Victoria and the ACT. In contrast, the legislation in South Australia and Tasmania allows only for written statements. Accordingly, their legislation should be updated to provide victims with greater choice. Consistent with current approaches in all of the research jurisdictions, victims should always be allowed to present their statement verbally. This must include access to all vulnerable witness provisions during presentation.

As a whole, it is important that the statement guidelines in each jurisdiction be updated to reflect the purpose and permissible content of impact statements accurately.⁵⁴¹ This must include an explicit and clear description of the role of impact statements, including their limitations, and the reasons for these limitations. This should allow victims to make an informed choice about whether to submit a statement. This in turn should reduce the likelihood that victims are surprised by any aspect of the impact statement process and avoid the potential for re-traumatisation.

Under the solutions proposed in this Chapter, victims can gain therapeutic outcomes from the process of sharing with the court, in their own words, and with the level of detail they choose, the harm that they have experienced as a consequence of the offending. Therapeutic value can also be gained from the

⁵⁴¹ Provision of accurate information about impact statement purpose was also identified as deficient in the findings of the recent Australian Royal Commission into Institutional Responses to Child Sexual Abuse. The Royal Commission also recommended that Australian governments should 'improve the information provided to victims and survivors to better prepare them for the process of making a victim impact statement and give them a better understanding of its role in the sentencing process': Commonwealth, above n 474, 102.

judge's use of the impact statement to determine a proportionate sentence for the offender. It is recognised, however, that the recommendations in this Chapter are not a perfect therapeutic jurisprudence solution. The potential for cross-examination of the victim on the content of their statement can only be viewed as anti-therapeutic from the victim's perspective. However, as discussed, if the content of an impact statement does not meet the standard of proof in the event of a challenge from the defence, then it cannot be taken into account by the judge when sentencing. This could also be anti-therapeutic from the victim's perspective. Therefore, this proposed solution has reconciled, as far as possible, the instrumental and expressive approaches to victim impact statements, in order to offer a solution that maximises the potential for a therapeutic experience for the victim.⁵⁴²

The next Chapter will explore the second of the two overarching problems that arose in the research interviews. Specifically, Chapter 7 concerns victims' rights to be informed about criminal justice and sentencing processes, and provides recommendations for improved communication skills for justice professionals when working with vulnerable populations such as victims of crime.

⁵⁴² Winick, above n 42, 540.

CHAPTER 7:

VICTIM EXPERIENCES OF IMPACT STATEMENTS AND SENTENCING: CHALLENGES OF COMMUNICATION WITH VICTIMS OF CRIME

I	Introduction	161
II	Victims' Need for and Right to Information	162
III	Provision of Information: Problems Arising in Practice	164
	<i>A Information about the Justice Process</i>	164
	<i>B Information about Sentencing</i>	167
	<i>C Identifying Potential Communication Barriers</i>	169
IV	Communicating Information to Victims of Crime.....	169
	<i>A Who is Responsible for Providing Information?</i>	169
	<i>B Communication Barriers that May Prevent Effective Information Sharing</i> ...	172
V	Evidence-Based Solutions to Identified Communication Barriers	176
	<i>A Effective Verbal Communication Skills</i>	176
	<i>B Effective Visual Communication</i>	178
	1 <i>South Australian Flowchart: The Criminal Justice System for Adult Offenders</i>	180
	2 <i>Victorian Flowchart: Summary of Court and Prosecution Process</i>	181
VI	Supplementary Strategies for Improving Communication with Victims of Crime	182
	<i>A Automated Notification Systems</i>	183
	<i>B Victim Liaison Services</i>	183
VII	Conclusion.....	185

I INTRODUCTION

As outlined in Chapter 6, the interviews undertaken with victims and justice professionals revealed two overarching problems around impact statements and sentencing. Chapter 6 concerned the first of these problems, namely the widespread uncertainty about the purpose of victim impact statements, and the corresponding uncertainty about how they can or should be used by the court. This Chapter concerns the second identified problem, namely a range of communication difficulties that arise between victims and justice professionals.

These appear to act as a barrier to justice professionals' fulfilment of their legal obligation to keep victims informed of the progress of their matter, including their obligation to inform victims about sentencing processes.

This Chapter begins by identifying the problems raised by the victims interviewed regarding their lack of knowledge of the progress of their case, and of court processes generally, including sentencing. It contrasts those victim experiences with the perspectives of the interviewed justice professionals on the information they believe they are communicating to victims. These problems are located in Australian victims' rights regimes, which require certain information to be provided to victims throughout the justice process. The Chapter then identifies a number of barriers that may prevent the effective sharing of information between victims and justice professionals, and proposes a series of evidence-based solutions to resolve the identified communication difficulties.

II VICTIMS' NEED FOR AND RIGHT TO INFORMATION

Crime victims' need to be provided with information about the criminal justice system, including information about the progress of their matter, has been long established. In 1985, Shapland, Willmore and Duff noted that the 'absence of information, both at the investigation and at the outcome stage, seems to be felt very keenly by victims.'⁵⁴³ Since then, researchers have consistently found that one of the greatest needs for victims throughout their justice system experience is to be provided with timely, accessible and accurate information.⁵⁴⁴ Consistent with Tyler's theory of procedural justice,⁵⁴⁵ 'victim satisfaction is linked to the amount of information they receive as to the progress of the case,'⁵⁴⁶ and as the Victorian Law Reform Commission has argued, 'accurate, timely and

⁵⁴³ Shapland, Willmore and Duff, above n 17, 78.

⁵⁴⁴ Clark, above n 21; ten Boom and Kuijpers, above n 73; Wedlock and Tapley, above n 54; Wemmers, above n 50; Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 8 *Victims and Offenders* 119; Marie Manikis, 'Imagining the Future of Victims' Rights: A Comparative Perspective' (2015) 13(1) *Ohio State Journal of Criminal Law* 163.

⁵⁴⁵ Tyler, above n 487, 31.

⁵⁴⁶ Shapland, Willmore and Duff, above n 17, 48.

personalised legal information can help ensure [that] victims have realistic expectations about what the criminal justice system can deliver, and what their role is'⁵⁴⁷ within it. In contrast, a lack of information, and the resulting stress and confusion about the justice process, can re-traumatise victims.⁵⁴⁸

The importance of providing information to victims is reflected in current victims' rights Acts and Charters around Australia. Most provide that a victim has the right to receive information about trial processes generally,⁵⁴⁹ and all provide the right to receive information about the progress of the case itself, such as information about the charges laid, hearings scheduled, and outcomes, including decisions made concerning acceptance of guilty pleas.⁵⁵⁰ Table 7.1 illustrates what these rights entail.

Table 7.1: Informational Rights under Australian Victims' Rights Regimes

Victims' Informational Rights	Checklist of Information that Victims are Entitled to Receive
1. The Justice System The right to receive information about the justice system and the trial process	Information about: <ul style="list-style-type: none"> • The role of the prosecution; • The role of defence; • The role of the judge; • The layout of the court, including where each party is seated; • The types of hearings that may be scheduled, including what may happen at each hearing; • Giving evidence, including, if applicable, victims' right to use vulnerable witness provisions; and

⁵⁴⁷ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (July 2014) 171.

⁵⁴⁸ Wemmers, above n 50, 68; Manikis, above n 544, 167; Konradi, above n 11, 194.

⁵⁴⁹ *Victims of Crime Act 1994* (ACT) s 4(g); *Victims of Crime Assistance Act 2009* (Qld) s 12(a); *Victims' Charter Act 2006* (Vic) s 11(1); Northern Territory Charter of Victims' Rights; Tasmanian Charter of Victims' Rights s 7.

⁵⁵⁰ *Victims of Crime Act 1994* (ACT) ss 4(b), 4(d); *Victims' Rights and Support Act 2013* (NSW) s 6(6.5); *Victims of Crime Assistance Act 2009* (Qld) ss 11(1), 12; *Victims of Crime Act 2001* (SA) ss 8(1)(a), 8(1)(e); *Victims of Crime Act 1994* (WA) Schedule 1 s 6; *Victims' Charter Act 2006* (Vic) ss 9(a), 9(c); Northern Territory Charter of Victims' Rights; Tasmanian Charter of Victims' Rights ss 2, 4.

Victims' Informational Rights	Checklist of Information that Victims are Entitled to Receive
	<ul style="list-style-type: none"> • Victims' right to submit an impact statement, including how and when this can be used
2. The Progress of the Case The right to receive information about the progress of the case	Information about: <ul style="list-style-type: none"> • The charges laid; • The hearings scheduled; • The outcomes of each hearing; and • Decisions made concerning acceptance of guilty pleas

III PROVISION OF INFORMATION: PROBLEMS ARISING IN PRACTICE

A Information about the Justice Process

Despite widespread academic appreciation of the need to keep victims informed throughout the justice process, and the existing obligations under Australian victims' rights regimes, each of the six victims interviewed for this research reported not knowing or understanding all or some of the criminal justice process. This included not being kept informed about the progress of their trial, and being unaware of the sentencing process. The following quotes demonstrate that the interviewed victims' need for information was not met by the justice professionals who worked with them:

Being more in the loop would be something that I would [have preferred]... I felt like I was told just 'be here at this time' ... while all this stuff was happening in the background, and that was the stuff I wanted to know. (August, Victim, SA)

I had no idea what the process was, and I would have to ask what was next. They would tell me if I asked, but I had no idea. (Emily, Victim, TAS)

Even that he had pleaded guilty, and wasn't trying to fight the charge, I wasn't told for a while. I thought I was still potentially going to trial for quite a while ... there were a few holes in the system that meant I was kept out of the loop. (Laura, Victim, SA)

Laura's case, in which she 'wasn't told for a while' that the offender had pleaded guilty, is a particularly alarming example of the failure to keep victims informed

in a timely fashion. Timeliness, as noted above, is an important aspect of victims' need for information. Yet a lack of timely information placed two of the victims interviewed in a position where they felt obliged to attend each court hearing in order to remain informed of the progress of their matter. This caused significant disruption to each victim's life throughout the course of the justice process:

Had I not made the decision to go to every court hearing, [the justice process] would not have worked for me. Because I wouldn't have had the information I was wanting, and when I did get it, it would have been weeks and weeks down the track. It worked for me because I was there for every step of the process, and I therefore knew what was happening as it happened. It got to the point when Witness Assistance would be ringing me and asking me for an update on what was happening. (Philippa, Victim, SA)

I attended until the end [of the sentencing process] merely to be kept thoroughly in the loop, because the time lapse and wait between hearings until the subsequent court date following adjournments, of sometimes weeks or months, were unbearable and the feedback that followed was a bare minimum. (Jessica, Victim, SA)

Several justice professionals interviewed reported being aware of problems around the lack of information provided to victims. For example, Victorian Victim Support Officer Trish said:

We hear from people all the time about how they feel that they are invisible throughout the legal process, that they are not communicated with regularly, that they aren't talked to about the purposes of the different court hearings, and they often don't know whether they are supposed to attend or not. Really basic stuff, and they are being left out of the loop.

Trish therefore confirms that problems around a lack of information are not exclusive to the victims interviewed for this research. Instead, this appears to be a widespread issue.

During their interviews, many justice professionals indicated that they were aware of the importance of keeping victims informed. When prompted, several

shared the approaches they take to ensure that victims are made aware of the justice process. Some of these included:

[We provide] general information about the court process, to more specific information about each step in the process, and information about victim impact statements if they get to that stage. (Suzanna, Victim Support Officer, ACT)

[We provide victims with] lots of procedural information and lots of practical information about their involvement, their role. And the rules and the etiquette of the court ... It's really important that they understand their role in court (Samuel, Witness Assistance Officer, SA)

We explain the procedure. For example, where the judge will be, where the jury will be, where counsel will be. We show them the courtroom. We explain examination in chief, and ... cross-examination ... and there are witness assistance officers who will take them down and show them the court, and will be in regular contact with them. (Michael, Prosecutor, TAS)

I explain what happens at a trial from start to finish ... and we do court tours ... I would explain about taking the oath or the affirmation, giving evidence in chief and cross-examination, and re-examination. (Hannah, Witness Assistance Officer, VIC)

It is significant that each of these justice professionals described the importance of explaining the trial process to victims, yet none mentioned the importance of keeping victims informed as the trial progresses. Of all the justice professionals interviewed, only Tasmanian Witness Assistance Officer Robert described his efforts to ensure that victims are kept informed on an ongoing basis about the progress of their trials:

Normally what we would do is explain to them over the phone when the first appearance is happening in court, and that we would get back to them and let them know what the plea is either at the first or second appearance. For an indictable matter when it comes to the Supreme Court, [we would keep them up to date with] what was happening.

This suggests that some of the justice professionals interviewed may not fully understand that victims' need for information includes the need for timely

information about the progress of the trial. An example of the gravity of failing to keep a particular victim updated about the progress of a trial was described by South Australian Victim Support Officer Cathy, who said ‘we had the unfortunate experience where a client was in the waiting room and opened up the newspaper and read about what had happened in court for her matter. No one had told her about it.’ Justice professionals should therefore be reminded of the importance of providing victims with information both about the justice process, and about the progress of the trial. This may be more easily facilitated through the implementation of a victim-focused automated notification system, which is discussed in Section VI below.

B Information about Sentencing

For some victims, the lack of information they received extended to a lack of information about the nature of the hearing at which their impact statement was presented. Four of the six victims reported not having been advised prior to this hearing about the substance of a plea in mitigation. That is, they were not informed that the hearing at which their impact statement would be presented would otherwise be largely offender-focused. This might include favourable submissions about the offender, including, for example, information about the offender’s good character or community involvement.

Victims August, Philippa, and Laura from South Australia, and Emily from Tasmania, did not recall being informed about this process at all. Consequently, Laura felt very uncomfortable during the hearing. She explained:

It would have been good if someone had said, ‘don’t take it to heart. This is the norm. This is what happens’. Afterward, when I had said I feel bad after hearing [the plea in mitigation], the detective said to me, ‘that’s just what they do; that’s what his lawyers are paid to do.’ There wasn’t any warning about it. The court process was all very new to me and not well explained at all.

This is another example of an unsatisfactory outcome for victims stemming from a lack of information. August, Philippa, Laura and Emily should have been informed prior to the hearing of the content of a plea in mitigation. This would

have prepared them for the hearing, and could have alleviated the distress described by Laura.

Significantly, justice professionals from all jurisdictions spoke of the importance of ensuring that victims are adequately prepared for the content of the offender's submissions in mitigation at sentencing. Two victim support officers particularly noted the distress that can be felt by victims upon hearing these submissions, and explained the importance of preparing them for the hearing:

I ensure that if clients are coming along to sit in on sentencing submissions, they know that they will hear things they feel uncomfortable about. They know the offender in one capacity. They know what violence that person is capable of committing. But they will get to hear about the charitable works, the good things about the person. Helping them to psychologically prepare for that experience is important. (Cathy, Victim Support Officer, SA)

[A plea in mitigation] is really confronting ... [Victims] often will have in their mind that they are going to hear his sentence, but not factoring in how distressing it can be to hear people get up and speak of his good character. That's something I would prepare them for. I would [explain] it's just part of the court process ... I have had clients feel distressed listening to it, so if someone wasn't prepared for it, it would be really distressing. (Colette, Victim Support Officer, VIC)

Others also noted how hard or unfair such submissions can feel to the victim, and consequently emphasised the importance of ensuring that victims are prepared for the type of submissions that may be made by the defence:

I always tell them [about the plea in mitigation]. I tell them that it's going to sound really one sided, ... defence will go through everything as they try to mitigate ... I explain that it is going to seem lopsided ... and doesn't seem fair. (Rose, Prosecutor, Victoria)

If they are going to attend [sentencing], I like to make sure that they know that a lot of it will be about the offender. Some victims go, not realising that they might do character references, or they might talk about what a great person the

offender is. I think that's really hard for victims to hear those things. (Suzanna, Victim Support Officer, ACT)

Many of the interviewed justice professionals revealed awareness of the importance of informing victims about the plea in mitigation, and demonstrated how carefully they ensure that victims are educated about this subject. Yet most of the interviewed victims reported not receiving this information. Accordingly, there appears to be a disconnect between the information that justice professionals believe that victims are receiving and the information that victims recall being told.

C Identifying Potential Communication Barriers

This Chapter proceeds upon the assumption that both victims and justice professionals are accurately reporting their experiences of information provision. That is, it assumes that justice professionals do attempt to communicate relevant information to victims, but that victims do not actually receive some or all of this information. On that assumption, it explores two significant matters that may act as barriers between justice professionals' communication of information and victims' receipt of that information. The first of these barriers is the current lack of clarity as to who is responsible for the communication of certain types of information to victims, which may explain why victims receive only some of the information to which they are entitled. The second barrier identified is the problematic approaches that professionals may take when communicating with victims. This barrier may explain why the information that justice professionals believe they are sharing with victims may not be wholly, or even partly, understood by the intended recipients.

IV COMMUNICATING INFORMATION TO VICTIMS OF CRIME

A Who is Responsible for Providing Information?

In the majority of Australian jurisdictions, including the jurisdictions in which the victim interviews were conducted, victims' right to information only exists if

the victim actively requests that information from the relevant agency.⁵⁵¹ For example, the South Australian victims' rights legislation says that the 'victim should be informed, on request,'⁵⁵² about information such as the progress of the investigation and the charges laid. The NSW, Queensland, Tasmanian, and Western Australian instruments are all expressed in similar terms; that is, the onus in these jurisdictions is on the victim to contact the police, witness assistance, or the DPP to obtain the required information, rather than the obligation resting with those agencies to keep the victim informed.

In contrast, the Victorian Act states that '[a]n investigatory agency is to inform a victim, at reasonable intervals, about the progress of an investigation into a criminal offence'⁵⁵³ and that '[t]he prosecuting agency is to give a victim, as soon as reasonably practicable, the [relevant] information.'⁵⁵⁴ The ACT and Northern Territory instruments also place the obligation to keep the victim informed on the police and prosecution agency.⁵⁵⁵

The interviews undertaken in South Australia and Tasmania suggest that the victims' rights instruments in those jurisdictions are operating entirely in accordance with their provisions; that is, the interviewed victims were not apprised of the progress of their case unless they contacted the appropriate agency to seek information. These provisions are therefore problematic, because of the negative consequences that arise for victims when they are not kept appropriately informed. These consequences, which were explored in Section II above, were summarised by Victorian Victim Support Officer Collette, who said: 'if the person is left hanging, and there is no communication and no word of what is happening, people can get to highly traumatised states.'

⁵⁵¹ See *Victims' Rights and Support Act 2013* (NSW) s 6(6.4); *Victims of Crime Assistance Act 2009* (Qld) ss 11, 12; *Victims of Crime Act 2001* (SA) s 8; *Victims of Crime Act 1994* (WA) Schedule 1 s 7; Tasmanian Charter of Victims' Rights.

⁵⁵² *Victims of Crime Act 2001* (SA) s 8(1).

⁵⁵³ *Victims' Charter Act 2006* (Vic) s 8(1).

⁵⁵⁴ *Ibid* s 9.

⁵⁵⁵ *Victims of Crime Act 1994* (ACT) s 4; Northern Territory Charter of Victims' Rights.

While it is possible that some victims may be aware that it is their responsibility to request information, and may also possess the capacity to seek it from the relevant agencies, it is equally possible that victims may not know that the onus is on them to seek such information, or may not possess the resilience or capacity to follow this up. This view is supported by Victorian Victim Support Officer Trish, who argued:

I think it's unfair to expect someone who is traumatised and going through the pressure of a court case to be able to advocate for themselves or even to be informed enough ... to do that. I think that expectation is unrealistic and unfair.

This was certainly the experience of some of the victims interviewed, such as Eve from Tasmania, who said:

If I have learned anything from this process, it's that nobody actually cares about the victim. I got a phone call out of the blue 15 months after he raped me, saying 'can you come to the DPP's office.' No one got in contact with me after it happened ... nobody did any follow up [with me] ... Throughout the 15 months I had to make phone calls to follow up, and I was always put through to different people, because the others were on holidays or whatever. So it was just bringing it all back every few months that I rang up to ask what was going on.

Eve's experience confirms that a lack of communication with the victim can result in their re-traumatisation. This is particularly unsatisfactory given that victims' rights regimes and victim impact statements were introduced as part of reforms intended to reduce the re-traumatisation of victims of sexual offending by the criminal justice process.

Accordingly, it is problematic that victims' rights regimes in some jurisdictions place the obligation on the victim to seek information about the progress of the investigation and trial, rather than placing the onus to provide that information on the police or prosecution agency. As Trish argued, it is not reasonable or fair to expect victims, who are likely to be in a traumatised state, to take responsibility for following up with various agencies to determine the progress of their matters. It is also not satisfactory that an instrument that purports to grant informational rights to potentially vulnerable and traumatised victims is

only activated in cases where victims have the personal capacity and resilience to follow up on that right themselves.

As discussed in Chapter 4, victim interviews were unable to be conducted in the ACT or Victoria. It is therefore not possible for this research to compare the difference in experiences or outcomes for victims from the jurisdictions where the onus is on the police or prosecution agency to provide information to victims. However, as quoted above, Victorian Victim Support Officer Trish noted that in her experience, victims are not communicated with regularly, and feel left out of the loop. This suggests that there may still be problems with the implementation of informational rights even in jurisdictions where the legislation places the onus on agencies to keep victims informed. This is also reflected by a recent report from the Victorian Law Reform Commission, which revealed that the Commission was told 'by a parent whose child had been killed, that she was not informed of sentencing hearing dates and was therefore not able to attend.'⁵⁵⁶

Nonetheless, it is recommended that to increase the level of information provided to victims throughout the justice process, consistency should be achieved across victims' rights instruments in all Australian jurisdictions. This would require amendments to the instruments in NSW, Queensland, South Australia, Tasmania and Western Australia to remove the responsibility for obtaining information about the progress of the criminal investigation and trial process from the victim, and instead place the onus to provide that information on the relevant agency. This change should be promoted to ensure that agencies are aware of their responsibility to keep victims informed throughout the entire justice process, which could begin to alleviate the problem of victims feeling 'out of the loop.'

B Communication Barriers that May Prevent Effective Information Sharing

Even under an improved informational rights regime, the interviews with Victorian justice professionals suggest that difficulties may still arise around

⁵⁵⁶ Victorian Law Reform Commission, above n 28, 107.

effective communication with victims. It is therefore arguable that justice professionals' current approaches to communication with victims of crime remain problematic. The interviews conducted for this thesis demonstrate both that the justice professionals were aware of the need to provide sufficient information to victims about court processes and sentencing hearings, and that the victims did not recall being told this type of information. It may therefore be that the interviewed victims were provided with this information, but did not recall it because they did not fully understand it.

It appears that issues of effective communication have rarely been explored in the context of justice professionals working with victims, and little has been written on practical communication strategies in this area. In fact, many communication texts 'devote the majority of their content to specific communication issues and give correspondingly less attention to core communication skills.'⁵⁵⁷ For example, Lewis and Jaramillo identified many barriers that can affect communication between victims and service providers, but provided few explicit strategies to overcome them.⁵⁵⁸ Similarly, a publication by the Office for Victims of Crime in the US also outlined a list of barriers that can prevent effective communication with victims, without offering practical solutions to overcome these problems.⁵⁵⁹ In contrast, medical professionals have long recognised the vast communication difficulties that can arise between doctors and patients. The medical literature is therefore a valuable resource for applied communication skills training.⁵⁶⁰

⁵⁵⁷ Jonathan Silverman, Suzanne Kurtz and Juliet Draper, *Skills for Communicating with Patients* (Radcliff Publishing, 3rd ed, 2013) 223.

⁵⁵⁸ Nancy Lewis and Ann Jaramillo, 'Communication with Victims and Survivors' (National Victim Assistance Academy, 2008).

⁵⁵⁹ Office for Victims of Crime, 'Listen to My Story: Communicating with Victims of Crime' (United States Department of Justice, 2005).

⁵⁶⁰ In contrast to communication theory literature, which offers much in terms of philosophies around human communication, yet little in terms of applied skills that can be used in practice by justice professionals. See, for example, Robert Heath and Jennings Bryant, *Human Communication Theory and Research: Concepts, Contexts and Challenges* (Lawrence Erlbaum, 2000).

Silverman, Kurtz and Draper have published a text that consolidates a large number of studies on the frequent problems that arise in communication in medical practice.⁵⁶¹ They report that doctors tend to give sparse information to their patients,⁵⁶² often underestimating the amount of information that their patients actually want.⁵⁶³ Further, patients frequently do not understand the language that doctors use, including technical language and shorthand.⁵⁶⁴ Consequently, patients tend not to understand or recall all of the information imparted by their doctors.⁵⁶⁵ This can be compounded by the 'highly emotional nature of illness [that may impede] rational communication and understanding.'⁵⁶⁶

It may be that the same problems affect communication between justice professionals and victims. It is arguable that prosecutors, witness assistance, and victim support officers share information with victims about justice processes that cannot be fully understood, either because the information is sparse, or because victims may not possess a fundamental understanding of the justice process, or because they may not understand legal jargon or shorthand, including acronyms such as 'the DPP' or 'OPP.' This argument is supported by Hargie, who noted that in the legal context, 'problems of comprehension [arise] with vocabulary and the technical meaning of some terms that can be at odds with everyday interpretations.'⁵⁶⁷ For example, victim Emily from Tasmania reported 'not knowing who the DPP was.' She stated that 'the prosecutor and witness assistance ... deal with these situations, these words, these people, these documents, on a daily basis, but I had no idea. They were saying all these words and I just didn't know.' Similarly, Laura from South Australia explained:

⁵⁶¹ Silverman, Kurtz and Draper, above n 557.

⁵⁶² Ibid 149.

⁵⁶³ Ibid 161.

⁵⁶⁴ Ibid 151.

⁵⁶⁵ Ibid 152.

⁵⁶⁶ Ibid 162.

⁵⁶⁷ Owen Hargie, *Skilled Interpersonal Communication: Research, Theory and Practice* (Routledge, 5th ed, 2011) 211.

[Justice professionals] assume that others understand the system enough to understand what is going to happen next. It's easy to assume that if you have that knowledge, that other people will have the same knowledge of the system and how it works. I have a decent amount of common sense, but there were things that were worded in ways that weren't clear, and they assumed I would understand that if one thing happened, that other things would follow.

These communication difficulties may be exacerbated by the psychological sequelae experienced by victims of crime, including 'difficulties in processing information ... poor concentration, difficulty with memory retrieval ... and a decreased ability to consider long range implications of events.'⁵⁶⁸ These difficulties were reflected upon by victim Emily from Tasmania, who said 'I didn't understand a lot, and at the time was overwhelmed ... I was in a frame of mind where they could have talked to me all day, and I wouldn't have taken that in.' Consequently, as Ashworth has noted, 'being told is not the same as being made to understand.'⁵⁶⁹

Using Silverman, Kurtz and Draper's research, this Chapter next explores a range of evidence-based solutions to address problems of communication between professionals and victims. These solutions are designed to ensure that appropriate levels of information are provided to victims, and to ensure that the information can be properly processed and retained by recipients.⁵⁷⁰

⁵⁶⁸ Gilbert Reyes, Jon D Elhai and Julian D Ford, *The Encyclopedia of Psychological Trauma* (Wiley, 2008) 176.

⁵⁶⁹ Ashworth, above n 145, 64.

⁵⁷⁰ It should be noted, however, that effective communication with victims of crime is a complex issue that deserves a level of careful scrutiny and consideration to which this thesis is unable to do justice. Therefore, the following Section focuses on the issue only within the context of the verbal and written information provided to victims by support agencies and prosecutors in the context of victim impact statements and sentencing.

V EVIDENCE-BASED SOLUTIONS TO IDENTIFIED COMMUNICATION BARRIERS

As set out in Table 7.1 above, victims have the right to receive information about trial processes in a general sense,⁵⁷¹ as well as information about the progress of their case, including information about the charges laid, hearings scheduled, and outcomes, including decisions made concerning acceptance of a guilty plea.⁵⁷² In essence, this means that victims are entitled to information about how the criminal justice system operates, starting with the role of the prosecution agency, defence lawyer, and judge. They must be informed prior to each court date of what the hearing might entail, followed by the outcome of hearings as they occur. They must be informed about their right to submit a victim impact statement, including information about how and when it might be used. A consideration throughout must be whether the information is communicated to victims in a format that can be easily understood and processed, both at the time of the communication as well as later. Silverman, Kurtz and Draper have provided a number of strategies to assist medical professionals to impart comprehensible information to patients. These strategies, discussed below, are equally applicable to justice professionals working with victims, and include the accessible communication of information verbally, as well as effectively conveying information using visual methods.

A Effective Verbal Communication Skills

Silverman, Kurtz and Draper recommend a number of strategies to ensure that verbal information is conveyed effectively. These require professionals to:

1. Assess the recipient's starting point prior to giving information. That is, the professional must determine the amount of information or knowledge the

⁵⁷¹ *Victims of Crime Act 1994* (ACT) s 4(g); *Victims of Crime Assistance Act 2009* (Qld) s 12(a); *Victims' Charter Act 2006* (Vic) s 11(1); Northern Territory Charter of Victims' Rights; Tasmanian Charter of Victims' Rights s 7.

⁵⁷² *Victims of Crime Act 1994* (ACT) ss 4(b), 4(d); *Victims' Rights and Support Act 2013* (NSW) s 6(6.5); *Victims of Crime Assistance Act 2009* (Qld) ss 11(1), 12; *Victims of Crime Act 2001* (SA) ss 8(1)(a), 8(1)(e); *Victims of Crime Act 1994* (WA) Schedule 1 s 6; *Victims' Charter Act 2006* (Vic) ss 9(a), 9(c); Northern Territory Charter of Victims' Rights; Tasmanian Charter of Victims' Rights ss 2, 4.

recipient already possesses in relation to the subject matter, prior to providing any further information;⁵⁷³

2. Give information in small, 'assimilable chunks.'⁵⁷⁴ The professional must ensure that information is given in small amounts, to enable the recipient to hear and process each piece of information before further information is provided;⁵⁷⁵
3. Check that the recipient has understood the small chunk of information, and use the recipient's response as a guide to how to proceed before providing any further information;⁵⁷⁶
4. Repeat information if the recipient has not understood;⁵⁷⁷
5. Reduce or eliminate the use of jargon;⁵⁷⁸ and
6. Ask the recipient what other information might be helpful.⁵⁷⁹

When combined, these strategies should ensure that victims are able to comprehend the information presented to them verbally. For example, victim Laura complained that the justice professionals she worked with seemed to 'assume that others understand the system enough to understand what is going to happen next.' This situation could have been avoided if the first strategy listed above had been used. By determining Laura's prior understanding of the justice system, the professionals who worked with her could have avoided the assumption that she understood more than she did and, consequently, could have provided Laura with appropriate levels of introductory information. Further, by avoiding the use of jargon, the justice professionals who worked with Emily could have avoided the confusion that she experienced when 'they were saying all these words and I just didn't know [what they meant].'

⁵⁷³ Silverman, Kurtz and Draper, above n 557, 24.

⁵⁷⁴ Ibid.

⁵⁷⁵ See also Hargie, above n 567, 223.

⁵⁷⁶ Silverman, Kurtz and Draper, above n 557, 24.

⁵⁷⁷ Ibid 174.

⁵⁷⁸ Ibid 175. See also Hargie, above n 567, 224-226.

⁵⁷⁹ Silverman, Kurtz and Draper, above n 557, 24.

Consequently, this thesis recommends that, based on the above-described strategies, verbal communication skills training should be conducted with justice professionals, in order to improve their communication when working with victims of crime.

B Effective Visual Communication

Silverman, Kurtz and Draper also recommend using visual methods of conveying information to aid the recipient's recall and understanding.⁵⁸⁰ Many victim support agencies and prosecution offices already publish information booklets designed for victims. However, these vary in their accessibility and utility, and may not serve as effective aids to victims' understanding. For example, in South Australia the booklet 'Information for Victims of Crime: Treatment, Impact and Access to the Justice System'⁵⁸¹ is published by the Victims of Crime Commissioner. This booklet is very comprehensive, but potentially overwhelming at 84 pages long. When reflecting on the length of this booklet, Victorian Prosecutor Rose was sceptical of its utility, commenting that '80 pages is very big ... I think you have to assume that although people are sent that information, that they don't really read it.'

Instead, a shorter booklet that is less comprehensive but that provides clear and specific information about each stage in the court process would serve as a greater aid to victims' understanding of the justice system generally. This view is supported by the experience of South Australian Victim Laura, who said:

They gave me an information sheet and booklets about the legal process. [These explained] what court is for what sort of offence, and about negotiations and sentencing. But I would have liked a little side bar of minor details about what happens there, because those are the things I didn't know ... Like where to sit, or where the offender is sitting, or who is going to go first. Those little details that add to the stress. I would have liked to be able to mentally prepare myself for it,

⁵⁸⁰ Ibid 176. See also Hargie, above n 567, 228-230.

⁵⁸¹ Available at South Australian Commissioner for Victims' Rights, *Information for Victims of Crime: Treatment, Impact and Access to the Justice System* <<http://www.voc.sa.gov.au/sites/default/files/Info-victims-of-crime.pdf>>

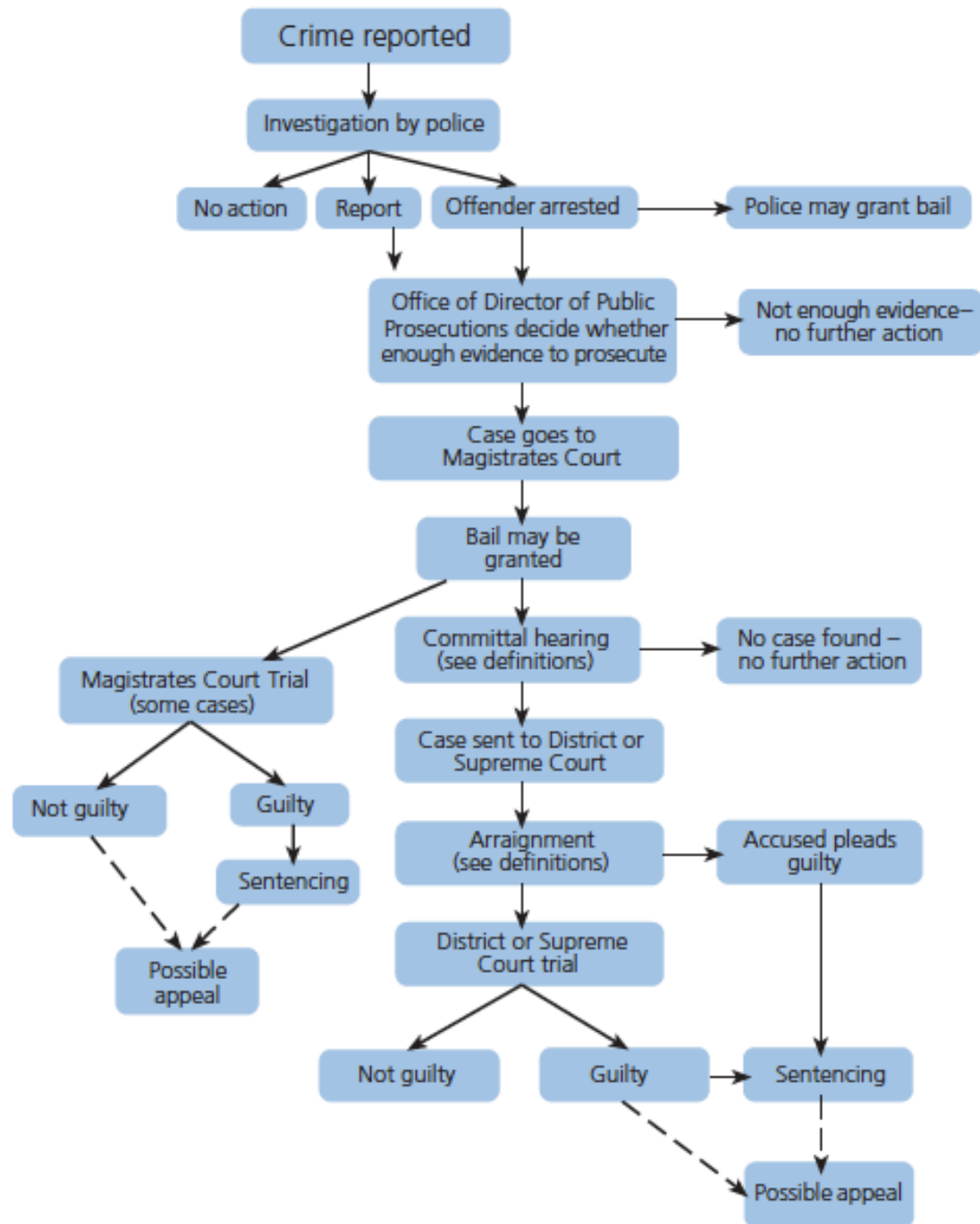
and remain as calm as I could. So I think that's what is lacking, and is probably not hard to fix, because they are very small details.

Her comment is significant because the South Australian booklet does contain much of the information that Laura desired. Page 43 of that booklet even contains a diagram of both the lower and higher courts, to illustrate the locations of the parties in the room. However, as Prosecutor Rose pointed out, it is unlikely that a booklet of that length would have been thoroughly read by the recipient. Accordingly, a shorter and more concise booklet would be preferable. The Victorian OPP has its own 'Pathways to Justice' booklet.⁵⁸² Yet at 52 pages, this booklet may also be overwhelming in length. It is preferable that victims be provided with condensed versions of these booklets, and the option of receiving a copy of the longer publication if desired.

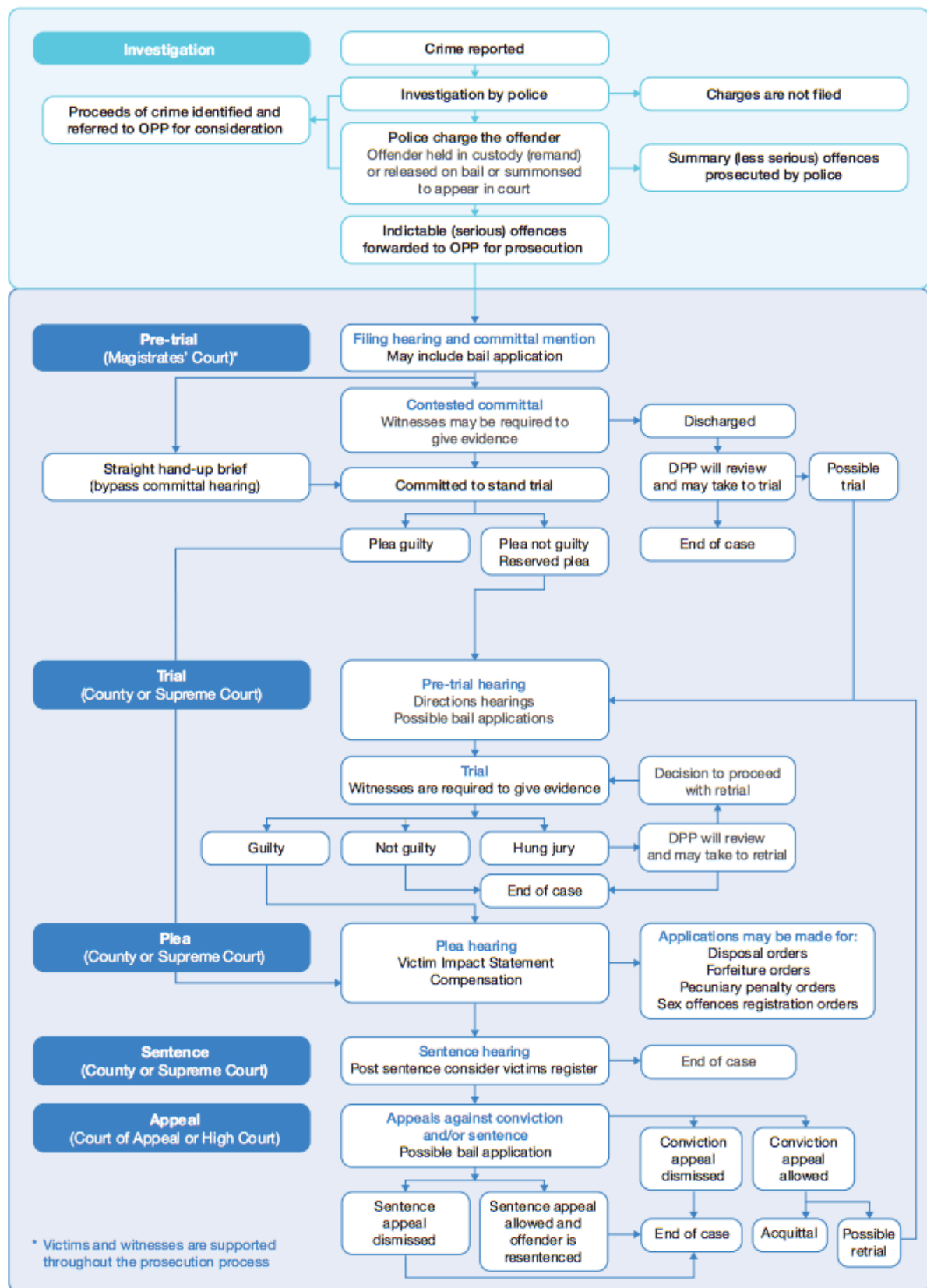
Of key importance in the development of a condensed booklet is the continued inclusion of the flowcharts from the current South Australian and Victorian booklets. A flowchart is ideal because it assists with visually communicating information, in accordance with Silverman, Kurtz and Draper's recommendation. The South Australian and Victorian flowcharts, which have been extracted from the victim booklets and included in the following pages for illustrative purposes, are concise, but contain sufficient detail to present the complete course of a criminal prosecution. The Victorian flowchart is spoken of highly by the justice professionals who use it. For example, Victim Support Officer Collette commented that she frequently uses the 'Pathways to Justice' booklet because it 'has a really good flow chart in it.'

⁵⁸² Available at Victorian Office of Public Prosecutions, *Pathways to Justice* <<http://www.opp.vic.gov.au/getdoc/9556d0e4-0d59-4fd3-ac0ef4f60edf2b97/Pathways-to-justice.aspx>>.

1 South Australian Flowchart: The Criminal Justice System for Adult Offenders



2 Victorian Flowchart: Summary of Court and Prosecution Process



At present, these charts are at risk of being overlooked by victims, due to the overall length of the publications in which they are published. For example, the South Australian chart is on page 30 of the 84-page booklet. Therefore, the inclusion of the chart and other vital information such as legal definitions in a condensed booklet is likely to be of more use to victims.

Other jurisdictions, such as the ACT and Tasmania, do not have an equivalent booklet or chart. But when asked if a similar flowchart would have been useful to her, Tasmanian victim Eve said:

Yes. To know anything would have been helpful ... I think as soon as you say that you want [the defendant] charged, they should give the flowchart to you. And then you would know how long it might take and when they might contact you next, and what would happen at court.

Similarly, Tasmanian victim Emily said that 'a summary would have been helpful to actually know why I was doing what I was doing, and what they were going to do with the information I was giving. That would have been quite helpful.' Accordingly, it is recommended that similar charts be prepared for these jurisdictions, and be distributed in short informational booklets that briefly explain court processes and also define key terms. To be of practical use, these booklets should also contain adequate space for victims to take notes and write questions they may wish to ask of support services or prosecutors.

VI SUPPLEMENTARY STRATEGIES FOR IMPROVING COMMUNICATION WITH VICTIMS OF CRIME

Two further strategies for providing information may complement the approaches proposed above, namely the introduction of automated systems that provide victims with brief details of upcoming hearings and outcomes, and the introduction of victim liaison services, to work with victims throughout the entire justice process. These are explored next to determine the appropriateness of their potential introduction into the Australian justice system.

A Automated Notification Systems

In response to problems around crime victims' receipt of information about court hearings and outcomes, automated methods for communicating with victims have been developed in the US. These systems have been gradually rolled out over the past 22 years, and now operate in 47 states.⁵⁸³ Automated notification systems provide crime victims with the opportunity to sign up to receive notifications about scheduled court hearings and outcomes. These notifications can be provided via a range of mechanisms, including telephone, email, and text message.⁵⁸⁴

While there is very little literature on the operation and effectiveness of automated notification systems,⁵⁸⁵ a recent review found that victims who subscribed to automated systems indicated that the notifications helped them to feel more empowered, to feel safe, and made them want to be more involved in their cases.⁵⁸⁶ Accordingly, it is recommended that similar systems be implemented in the Australian context. While automated notifications would not alleviate the problems surrounding victims' lack of understanding of the criminal justice system and sentencing more generally, they could assist agencies to fulfil their obligations under each jurisdiction's victims' rights instruments to provide victims with regular and timely information.

B Victim Liaison Services

The issue of communicating information to victims of crime was also discussed in a 2014 research report by the Australian Institute of Family Studies (AIFS).⁵⁸⁷ One of the recommendations arising from this report was the suggested

⁵⁸³ Seri P Irazola et al, 'Keeping Victims Informed: Service Providers' and Victims' Experiences Using Automated Notification Systems' (2015) 30(3) *Violence and Victims* 533.

⁵⁸⁴ United States Department of Justice, *Victim Notification Program* <<https://www.justice.gov/criminal-vns>>.

⁵⁸⁵ Irazola et al, above n 583, 533.

⁵⁸⁶ *Ibid* 539.

⁵⁸⁷ Bluett-Boyd and Fileborn, above n 19. The AIFS researchers undertook court observations and interviewed 81 criminal justice stakeholders regarding sexual assault law reforms.

implementation of victim liaison officer roles around the country. According to the AIFS, 'the purpose of this position would be to respond to victim/survivor information needs, particularly during times of inactivity, as a case navigates its way along the criminal justice process.'⁵⁸⁸ The role envisaged by the AIFS would involve liaison not only between victims and the various criminal justice and support agencies, but also between the different agencies to address gaps in their communication with each other.⁵⁸⁹ The Victorian Law Reform Commission also recently mooted a victim liaison officer proposal.⁵⁹⁰

These proposals are certainly worthy of consideration, and if implemented effectively may alleviate some of the problems identified by the interviewed victims. However, the implementation of the communication strategies recommended in this Chapter may allay the need for additional support roles. Further, it should be noted that the current Witness Assistance Services in the ACT, NSW, Northern Territory, South Australia, Tasmania and Victoria, the Victim Coordination Program in Queensland, and the Witness Support Service in Western Australia, all advertise their function as providers of information about court procedures and court outcomes, and their duty to act as a liaison with prosecutors on behalf of victims.⁵⁹¹

⁵⁸⁸ Ibid 53.

⁵⁸⁹ Ibid.

⁵⁹⁰ Victorian Law Reform Commission, above n 547, 172.

⁵⁹¹ Australian Capital Territory Director of Public Prosecutions, *The Witness Assistance Service* <http://www.dpp.act.gov.au/witness_and_victim_services/the_witness_assistance_service>; New South Wales Office of the Director of Public Prosecutions, *Witness Assistance Service* <<http://www.odpp.nsw.gov.au/witness-assistance-service/about-the-was>>; Northern Territory Director of Public Prosecutions, *Witness Assistance Service* <<http://www.dpp.nt.gov.au/witnessassistance/Pages/default.aspx>>; Queensland Government, *Victim Coordination Program* <<https://www.qld.gov.au/law/court/victim-coordination-program>>; South Australian Director of Public Prosecutions, *Witness Assistance Service* <<http://www.dpp.sa.gov.au/was/witnesses/witness-assistance-service>>; Tasmania Director of Public Prosecutions, *Witness Assistance Service* <http://www.crownlaw.tas.gov.au/dpp/witness_assistance_service>; Victorian Office of the Director of Public Prosecutions, *Witness Assistance Service* <<http://www.opp.vic.gov.au/Witnesses-and-Victims/Getting-Help-from-the-Witness-Assistance-Service>>; Government of Western Australia, *Victim Support Service* <http://www.victimsofcrime.wa.gov.au/S/support_for_victims.aspx>.

It is therefore worth investigating whether existing barriers may prevent the current victim/witness services from fulfilling their stated purpose, before any new victim liaison role is implemented. It is unclear exactly how much the proposed victim liaison role would differ from the present victim/witness support services, and whether the proposed role would be subject to the same barriers that may currently impede the effective operation of victim/witness services. Again, it is possible that an issue lies with a misplaced burden of communication on the victim. For this reason, it is recommended that any proposed victim liaison officer scheme places the obligation to maintain contact and provide information on the liaison officer, rather than the victim.

VII CONCLUSION

One of the major problems identified in interviews with both victims and justice professionals is the communication difficulties that seem to act as a barrier to justice professionals' fulfilment of their obligation to keep victims appropriately informed of the justice process, including the sentencing process. Victorian Victim Support Officer Trish summarised the problem clearly:

[Victims] feel uninformed, they don't understand the process, they feel out of control within the process in terms of how long it takes, what happens, and what their role is within it. I think it's a real problem. I think it re-traumatises the vast majority of victims who have experienced sexual assault, by the nature of how the process operates.

Many justice professionals interviewed detailed the type of information they usually provide to victims throughout the justice process, yet each of the victims interviewed reported not receiving at least some of the information that they were entitled to. This suggests that there is a disconnect between the information that justice professionals believe that victims are receiving, and the information victims recall being told.

The solutions proposed by this Chapter are based on the assumption that both victims and justice professionals accurately report their experiences of information provision. On this basis, the Chapter identified two significant

problems that may act as barriers between justice professionals' communication of information, and victims' receipt of that information. The first of these barriers is the current lack of clarity as to who is responsible for the communication of certain types of information to victims, which may explain why they receive only some of the information to which they are entitled. In response to this problem, it is recommended that victims' rights regimes in NSW, Queensland, South Australia, Tasmania and Western Australia be amended to remove the responsibility for obtaining information about the criminal investigation and trial process from the victim, and instead place the onus to provide that information on the relevant agency, as is the case in the ACT, Northern Territory and Victoria. It is also recommended that automated notification systems be implemented within the Australian jurisdictions. This could further assist agencies to fulfil their obligations to provide victims with ongoing information.

The second barrier identified relates to the problems that may arise when professionals attempt to communicate with victims. This barrier may explain why the information that justice professionals believe they are sharing with victims may not be wholly, or even partly, understood by the recipients of that information. Based on Silverman, Kurtz and Draper's recommendations, suggestions were made for strategies that might improve verbal communication. These strategies would require justice professionals to: assess the victim's starting point prior to giving information; ask what information might be helpful; give information in small pieces; check that the victim has understood the information; and use the victim's response as a guide to how to proceed before providing any further information. Justice professionals should also repeat information if the victim has not understood it, and reduce or eliminate the use of jargon. When combined, these strategies should ensure that victims are able to better comprehend and remember the information presented to them verbally. Based on these strategies, verbal communication skills training should be conducted with justice professionals in order to improve their communication with victims of crime.

It is also recommended that victims be provided with condensed versions of the existing victim information booklets in South Australia and Victoria. Similar short booklets should be developed in the ACT and Tasmania, and any other Australian jurisdiction that does not currently offer victims this type of information. The publications of such booklets should alleviate the problem described by victim Emily from Tasmania, who said:

If someone could have told me 'this is probably what is going to happen, this is probably the path that it's going to take', that would have been a really good heads up ... getting my head around that sort of stuff is a task ... A cheat sheet would have been great.

The conclusion of this thesis follows next in Chapter 8. It describes this project's main research outcomes, identifies the original contributions to knowledge that this thesis has achieved, and summarises its recommendations. The limitations of the research are also discussed, and future research directions are identified.

CHAPTER 8:

CONCLUSION AND DISCUSSION OF RECOMMENDATIONS FOR REFORM

I	Introduction	188
II	Achieving Research Aim 1: Gaining a Better Understanding of Victim Perspectives of Impact Statements and Sentencing	190
	A <i>Finding 1: The Unclear Purpose of Victim Impact Statements</i>	191
	1 <i>Recommendations for a Proposed Model to Achieve Impact Statement Consistency</i>	191
	B <i>Finding 2: Problems Affecting Victims' Right to Information</i>	193
	1 <i>Recommendations for Amendments to Victims' Rights Instruments</i>	193
	C <i>Finding 3: Communication Barriers between Justice Professionals and Victims</i>	195
	1 <i>Recommendations for Communication Skills Training for Justice Professionals</i>	195
III	Achieving Research Aim 2: Identifying Current Judicial Sentencing Practice	196
	A <i>Finding 4: Current Judicial Practice around the Acknowledgment of Victims at Sentencing</i>	196
	1 <i>Recommendations for Best Judicial Practice when Acknowledging Victims at Sentencing</i>	197
IV	Limitations of the Research	198
V	Future Research Directions	199
VI	Conclusion: Implications for Victim Impact Statement Policy and Practice	200

Courts need to change. The distress of a trial cannot be completely eliminated, but there are specific steps we should take to reduce trauma.⁵⁹²

I INTRODUCTION

Since the 1980s, legislative and policy reforms in Australia have increased the role that victims play in the justice process, through the introduction of victim

⁵⁹² Philip Cummings, Chair of the Victorian Law Reform Commission, *Respect the Rights of Victims of Crime in Court* <<http://www.lawreform.vic.gov.au/media/respect-rights-victims-crime-court-vlrc-report>>.

impact statements at sentencing. These reforms were intended, at least in part, to address barriers that contributed to high attrition rates for the prosecution of sexual offences, and to reduce anti-therapeutic aspects of victim involvement in the criminal justice process. Yet victim experiences of impact statements and sentencing are infrequently researched. This is particularly so for research that focuses on victims of sexual offending specifically, and for research that interviews victims directly. Of the research that has been conducted, recent findings describe the therapeutic benefits that victims derive from judicial acknowledgment of their impact statement at sentencing. However, very limited research has explored or quantified judicial practice in this area. This thesis therefore had three major aims:

1. To gain a better understanding of victim perspectives of victim impact statement and sentencing processes and procedures in sexual offence cases;
2. To explore judicial practice in relation to the use of and reference to victim impact statements at sentencing in sexual offence cases; and
3. To determine whether any recommendations could be made for policy or legislative reform to achieve best practice for victim impact statement processes and procedures from a victim-focused perspective.

The research involved in-depth interviews with six victims of sexual offending, and with 15 justice professionals who work with victims throughout the impact statement and sentencing process. It also involved an analysis of 100 sentencing transcripts from sexual offence matters to explore judicial acknowledgment of impact statements at sentencing. Victim impact experiences of victims of sexual offending have not previously been explored in this way, in Australia or elsewhere. Accordingly, this combination of research approaches has allowed for a unique and rich analysis of victim experiences, and has produced a number of original contributions to knowledge, including identifying:

1. Problems arising from a pervasive lack of understanding of the purpose and function of victim impact statements. Consequently, recommendations were made for a model that will, if adopted, achieve coherence and clarity in Australian impact statement regimes;

2. Problems affecting victims' receipt of information throughout the justice process. Accordingly, recommendations were made for the reform of victims' rights instruments in some Australian jurisdictions, and for the introduction of automated notification systems to assist agencies in their duty to provide victims with timely information;
3. Barriers that may affect communication between justice professionals and victims. In response, evidence-based communication strategies and communication skills training were recommended to assist justice professionals to communicate more effectively with victims of crime; and
4. Current judicial practice around the acknowledgment of victim impact statements in sexual offence cases, as well as the difficulties judges face when seeking to acknowledge victims in a therapeutically effective manner. This generated a number of recommendations for educative processes to help judges develop a clearer understanding of the possible therapeutic and anti-therapeutic consequences of their acknowledgment of victims at sentencing.

This Chapter concludes the thesis by consolidating the research findings and recommendations, and summarising their implications for legislative and policy reform. It also restates the limitations of the research, and identifies future research directions arising from the recommendations.

II ACHIEVING RESEARCH AIM 1: GAINING A BETTER UNDERSTANDING OF VICTIM PERSPECTIVES OF IMPACT STATEMENTS AND SENTENCING

The first aim of this thesis was to achieve a better understanding of victim perspectives of impact statement and sentencing processes and procedures in sexual offence cases. This was accomplished through the process of conducting and analysing interviews with victims and justice professionals. Three key findings arose from the interview analysis. These findings are consolidated in the following subsections. In accordance with the third research aim of this thesis, the summary of each finding is followed by the recommendations made for policy or legislative reform to achieve best possible practice from a victim-focused perspective.

A Finding 1: The Unclear Purpose of Victim Impact Statements

The first significant finding from the interviews was that the interview participants experienced numerous practical difficulties because impact statement legislation, case law, policies, and guidelines are all inconsistent in their guidance around the actual purpose of impact statements. Consequently, justice professionals are unable to provide coherent and consistent advice to victims about the type of information they can include in their statement, and how the statement may be used by the court. This finding is not unique to the Australian context. Similar issues have arisen in Canada. In response, Manikis developed an impact statement model designed to reconcile instrumental and expressive approaches, and achieve clarity and consistency in impact statement purpose.⁵⁹³ Chapter 6 used a combination of the fundamental principles of criminal justice, Australian impact statement law, and the findings of the interviews undertaken for this thesis to critique the applicability of the Manikis Model to the Australian context. It ultimately recommended the adoption of a modified and expanded version of the Manikis Model for the Australian jurisdictions covered by this research.

1 Recommendations for a Proposed Model to Achieve Impact Statement Consistency

The model proposed by this thesis promotes an expressive approach to impact statements, while maintaining certain rules to ensure that statements can also be used instrumentally, without disadvantaging the offender. Under the proposed model, victims are offered a great deal of flexibility in their expression and in the form of their statement. They may present their statement in a variety of ways, such as prose, drawings, poems and/or songs. Victims may also choose to present their statement verbally using vulnerable witness provisions, or to have someone else present it verbally on their behalf.

Under the proposed approach, the victim is allowed to include within their statement any information about the harm they have experienced, without this

⁵⁹³ Manikis, above n 95.

being limited to the harm caused only by the offences for which the offender has been convicted. However, only the actual harm suffered by the victim in respect of the offences for which the offender is convicted will be considered relevant to the determination of the offender's sentence. Consequently, prosecutors and witness assistance officers are not responsible for editing impact statements to remove information that may be considered irrelevant. Instead, the judge is responsible for deciding which, if any, parts of the statement are irrelevant to the offender's sentence, and must make clear if and how they have done so. If a victim is to be cross-examined on the content of their statement, a pre-sentence hearing should facilitate the settlement of questions to be asked in cross-examination. This would act as an additional safeguard to ensure that victims are not re-traumatised by the process of cross-examination. The model proposed by this thesis is schematised in Table 8.1.

Table 8.1: Proposed Australian Model for Victim Impact Statements

Issue	Proposed Australian Model
1. Clarity Lack of clarity around the function and purpose of impact statements	The proposed model values both the instrumental and expressive functions of impact statements.
2. Content The permissible content of impact statements	Impact statements can contain any information the victim wishes to include, but only the actual harm caused to the victim as a consequence of the offending will be considered relevant to the determination of sentence. It is the responsibility of the judicial officer to discard irrelevant information when sentencing the offender and to make it clear in the sentencing remarks that this has been done.
3. Form The permissible form of the impact statement	Victims can present their statement in a variety of forms, including in writing, verbally, in poems, drawings and/or songs.
4. Cross-examination The permissibility of cross-examining victims on their impact statement	Victims can be cross-examined only under vulnerable witness provisions. In any case where the victim is to be cross-examined on their impact statement, a pre-sentence hearing should settle the questions that will be permitted and the manner of questioning. The unrepresented

Issue	Proposed Australian Model
	offender must never be allowed to conduct this cross-examination, and the judge must disallow any and all improper questions.
5. Timeframes The timeframes for preparation of the impact statement	The impact statement should be submitted only if/when the offender has been found guilty.
6. Presentation The permissible methods for impact statement presentation	Victims may present their written statement verbally to the court, or it may be presented verbally by another person of the victim's choosing. Victims should always be offered the option to present their statement using the full range of vulnerable witness provisions.

This proposed approach is largely consistent with current Victorian practice. The legislation and policies in other Australian jurisdictions require more substantial reforms to apply the proposed model. However, those other jurisdictions can look with confidence to the therapeutically effective, victim-focused precedent set by Victoria when reforming their own impact statement laws and procedures.

B Finding 2: Problems Affecting Victims' Right to Information

The second significant finding arising from the interviews was that each victim interviewed reported not receiving some or all of the information they were entitled to receive about the justice system. This included information about:

- Court processes generally;
- Sentencing processes; and
- The ongoing progress of their individual case.

It was determined that this problem may arise, in part, from a misplaced burden of communication on the victim.

1 Recommendations for Amendments to Victims' Rights Instruments

In the majority of Australian jurisdictions, including the jurisdictions in which the victim interviews took place, victims' right to information only exists if

victims actively request the information from the relevant agency. This places the onus on the victim to contact the police, witness assistance, or DPP to obtain information about the progress of a case, rather than placing the obligation on those agencies to keep the victim informed. In contrast, some other jurisdictions place the burden of communication on the relevant agency instead.

It was evident from the interview findings that the victims' rights instruments in South Australia and Tasmania are operating entirely in accordance with their provisions; that is, victims are not kept apprised of the progress of their case unless they contact the appropriate agency to seek information. Chapter 7 argued that it is not reasonable or fair to place the obligation on victims, who are likely to be in a traumatised state, to take responsibility for following up with agencies to determine the progress of their matter.

It was consequently recommended that all victims' rights instruments in Australia place the burden of communication on the relevant agency rather than on the victim. To achieve consistency across the jurisdictions, instruments in NSW, Queensland, South Australia, Tasmania and Western Australia must be amended to reflect the more appropriate provisions in the ACT, Northern Territory and Victoria. This change should assist to alleviate the issue of victims feeling 'out of the loop.'

All jurisdictions should also implement automated notification systems. These systems allow crime victims to sign up to receive notifications about scheduled court hearings and outcomes. The notifications can be provided via a range of mediums, including telephone, email, and text message. While there is limited literature on the effectiveness of automated systems, a recent review found that victims who subscribed to them indicated that the notifications helped them to feel safe, empowered, and made them want to be more involved in their case.⁵⁹⁴ Automated notifications would not alleviate the issue of victims' lack of understanding of the criminal justice system generally. They would, however,

⁵⁹⁴ Irazola et al, above n 583.

assist agencies to discharge their obligations to provide victims with ongoing and timely information as their case progresses.

C Finding 3: Communication Barriers between Justice Professionals and Victims

The third significant finding arising from the interviews was the identification of several communication barriers between justice professionals and victims. Chapter 7 explained that prosecutors, witness assistance and victim support officers may share information about justice processes that cannot be not fully understood by victims, either because the information is sparse, or because victims may not possess a fundamental understanding of legal processes, or because they do not understand legal jargon or shorthand.

1 Recommendations for Communication Skills Training for Justice Professionals

Chapter 7 relied on Silverman, Kurtz and Draper's evidence-based communication skills research to recommend a range of strategies that may alleviate communication barriers between victims and justice professionals. In summary, these strategies require justice professionals to: assess the victim's starting point prior to giving information; ask what information might be helpful; give information in small pieces; check that the victim has understood the information; and use the victim's response as a guide to how to proceed before providing any further information. Justice professionals should also repeat information if the victim has not understood it, and reduce or eliminate the use of jargon. When combined, these strategies should ensure that victims are able to better comprehend the information presented to them verbally. Based on these strategies, verbal communication skills training should be conducted with justice professionals, in order to improve their communication with victims of crime.

It was also recommended that victims be provided with information about court processes in visual form, through the creation of condensed versions of existing victim information booklets in South Australia and Victoria. These booklets should contain relevant definitions and flowcharts depicting the justice process. Similar short booklets should be developed in the ACT and Tasmania, and any

other Australian jurisdiction that does not currently offer victims this type of publication. To be of practical use, the booklets should also contain adequate space for victims to take notes and write questions they may wish to ask of support services or prosecutors.

III ACHIEVING RESEARCH AIM 2: IDENTIFYING CURRENT JUDICIAL SENTENCING PRACTICE

The second aim of this thesis was to explore judicial practice in relation to the use of and reference to victim impact statements at sentencing. This was achieved through the analysis of a dataset of 100 sentencing remarks from sexual offence cases, collected from the four research jurisdictions between 2014 and 2016. This analysis was also informed by findings from the interviews with both victims and justice professionals. The findings are briefly explained below, before the recommendations made in accordance with the third aim of this thesis are summarised.

A Finding 4: Current Judicial Practice around the Acknowledgment of Victims at Sentencing

The analysis of sentencing remarks found that victims and their impact statements were acknowledged in 95 of the 100 cases, with harm to victims' families also mentioned in 15 cases. Victoria was the only jurisdiction in which the judge acknowledged the victim during sentencing in all cases (n = 40). In the ACT, judges did not acknowledge the victim in three of the 22 cases, in contrast to one case each in South Australia (n = 22) and Tasmania (n = 16). This is consistent with Booth's review of 'sentencing judgements more broadly across Australian jurisdictions [which] reveals it is rare for a sentencing judge not to refer to VISs.'⁵⁹⁵

The ideal extent to which a judicial officer should refer to or acknowledge a victim at sentencing had not been previously established. However, the Victorian

⁵⁹⁵ Booth, above n 92, 150.

Victim Support Agency found in its 2014 research that victim support and witness assistance officers speak highly of judges who speak in detail about victims, as opposed to those who provide minimal acknowledgment, with a one-sentence reference described as ‘tokenistic.’⁵⁹⁶ The justice professionals interviewed for this research agreed that acknowledgment consisting of a mere sentence is problematic, because of the risk that victims will not feel that they were taken seriously. This would negate the potential benefit or validation that victims might otherwise gain from more detailed acknowledgment.

However, while the findings from the sentencing remarks analysis and victim interviews demonstrated that detailed judicial acknowledgment can be therapeutically beneficial for victims, the interviews also demonstrated that too much detail can have negative consequences for some victims. These results reveal the significant challenges that judicial officers face when crafting therapeutically effective sentencing remarks.

1 Recommendations for Best Judicial Practice when Acknowledging Victims at Sentencing

Chapter 5 proposed two recommendations to ensure that judicial officers are educated on the possible therapeutic and anti-therapeutic consequences of their acknowledgment of victims at sentencing. The first recommendation was the publication of a victim-focused benchbook to guide judges concisely and clearly through the ‘dos and don’ts’ of victim acknowledgment at sentencing. This publication should contain real-life examples, like those included in Chapter 5, to illustrate particular judicial approaches that appear to have effectively and therapeutically met the needs of the victims involved. It should also flag matters of particular sensitivity to victims, such as sharing details about their mental health, which should perhaps not be published too explicitly in sentencing remarks. Based on the findings of this thesis, the benchbook could suggest alternative ways to handle this sort of information, in terms of the style of remarks identified as being most likely to have beneficial outcomes for victims.

⁵⁹⁶ Victorian Department of Justice, above n 172, 59.

The second recommendation was the introduction of a mechanism that will enable judges to be informed, prior to sentencing, if there is material within a victim impact statement that is particularly sensitive and should therefore not be outlined in detail in the judge's sentencing remarks. This would require the judicial officer to convene a short pre-sentence hearing with prosecution and defence counsel, where any particularly sensitive material could be identified by the prosecutor. The hearing would also benefit the defence, by providing an opportunity for the judicial officer to make clear what information from the impact statement would be relied on in passing sentence. As per the recommendations made in Chapter 6, this hearing would also allow the defence to raise any relevant issues they may have with the content of the impact statement and would facilitate the settlement of any questions to be asked of the victim in cross-examination.

IV LIMITATIONS OF THE RESEARCH

As explored in Chapter 4, there were a number of limitations to the research. These were largely due to the small and exploratory nature of the study, and the strict inclusion criteria for victim participants. As previously noted, the six victim interviews were fewer than originally planned. Consequently, the sample cannot be seen as representative of all victims of sexual offending who complete victim impact statements. It is further recognised that because the justice professional interviewees were self-selected, this also limits the representativeness and consequent generalisability of the interview findings arising from this cohort of participants.

Secondly, while this thesis examines judicial use of impact statements at sentencing by analysing transcripts from a sample of sentencing hearings, copies of the impact statements from those sentencing hearings were not obtained. This decision was made because it was identified that difficulties could arise in accessing these statements, due to concerns for victims' privacy. This did not prevent critique of the way that judges used and referred to impact statements at

sentencing, but it did mean that certain aspects of that critique were speculative in nature.

Thirdly, financial and time constraints prevented this analysis from being supplemented by the further understanding that would have been gained by also interviewing judicial officers. Resource constraints also meant that only four of the eight Australian jurisdictions were researched in this thesis. It is quite possible that beneficial practices go unacknowledged in the remaining jurisdictions.

V FUTURE RESEARCH DIRECTIONS

There are two immediate future research directions identified by this thesis. The first arises from the recommendations made in Chapters 5 and 6, regarding the implementation of a victim-focused pre-sentence mechanism to settle both prosecution and defence issues around victim impact statements. The second arises from the recommendation made in Chapter 7, that Australian jurisdictions should implement automated notification systems to assist agencies to fulfil their obligations to keep victims informed throughout the justice process. The feasibility of these recommendations should be investigated promptly. This research should investigate the potential effects and outcomes of the recommended proposals on victims, judicial officers, legal practitioners, and more broadly, on the resources of the courts and agencies who would implement the proposed mechanisms.

Any research on these subjects, and any further research on the subject of victim impact statements, would greatly benefit from an extended scope. This should include research undertaken in the Australian jurisdictions that were not subject to examination in this thesis, and an increased sample size. Future research samples should include judicial participants, as well as experienced defence practitioners, who should be asked to provide insight into the possible effects of the proposed recommendations upon defendants. Furthermore, reform proposals arising from research outcomes in this thesis, or from future impact

statement research, must be subject to feedback and scrutiny from victim support and witness assistance officers, judicial officers, and experienced prosecution and defence practitioners, whose views must be sought to properly inform the reform process.

VI CONCLUSION: IMPLICATIONS FOR VICTIM IMPACT STATEMENT POLICY AND PRACTICE

As outlined above, the research undertaken for this thesis was unique. No other published research has taken the same approach when exploring victims' experiences of impact statements and sentencing.

This thesis contains the first analysis of sentencing remarks to quantify judicial reference to victims and their impact statements at sentencing in Australia. Informed by established literature on victims' justice needs,⁵⁹⁷ the analysis identified practices that are therapeutic and anti-therapeutic from a victim-focused perspective. The recommendations arising from the results of the analysis, particularly the publication of a victim-focused benchbook, will provide judicial officers with clear, evidence-based guidance for effective acknowledgment of victims at sentencing. The recommendations therefore have significant implications for judicial officers in practice, who will be able to rely on them when crafting their sentencing remarks.

This thesis also contains an analysis of the first interviews undertaken to explore the impact statement experiences of Australian victims of sexual offending. The interviews revealed a number of significant research findings. The divide between expressive and instrumental approaches to impact statements has been sporadically explored in previous research.⁵⁹⁸ However, the previous research did not identify the significant practical problems that this divide can cause for justice professionals, who consequently cannot provide accurate and comprehensive information to victims about current impact statement schemes.

⁵⁹⁷ See, for example, Daly, above n 16.

⁵⁹⁸ See, for example, Roberts, above n 93; Manikis, above n 95; Booth, above n 92.

Furthermore, victims' need for information about the justice process has been long established,⁵⁹⁹ and is well understood by both academics and by the justice professionals interviewed for this thesis. Consequently, the finding that information provision problems continue to affect victims was unexpected. This thesis has therefore demonstrated the significant benefits of directly interviewing victim participants when investigating victims' experiences of the justice system, rather than relying solely on the perspectives of the professionals who work closely with them.⁶⁰⁰ It is strongly recommended that any future researchers continue to investigate victims' experiences of impact statements directly.

In conclusion, this thesis has both empirically confirmed and built upon the findings of previous impact statement research. It has also elucidated the significant implications of the past and present research findings for the day-to-day practice of judges, and of justice professionals and the victims with whom they work. Moreover, the thesis has recommended a number of practical and clear solutions to each of the problems identified by the research, which will achieve the therapeutic jurisprudence goal of minimising the unintended anti-therapeutic effects of impact statement processes, and maximising the potential for healing for the victim.⁶⁰¹ These findings and the resultant recommendations therefore have implications for victim impact statement policy and practice across Australia, and indeed any jurisdiction that seeks to promote a victim-focused model for victim impact statements.

⁵⁹⁹ Shapland, Willmore and Duff, above n 17.

⁶⁰⁰ This has been common in previous impact statement research. See Appendix 1, which contains a summary of previous interview and survey research on victim impact statements and sentencing.

⁶⁰¹ Winick, above n 42, 536.

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APPENDIX 1:

PREVIOUS INTERVIEW AND SURVEY RESEARCH

WITH ADULT VICTIMS

ON SENTENCING AND VICTIM IMPACT STATEMENTS

Author(s)	Jurisdiction	Participants	Research Approach	Description
Erez, Roeger Morgan (1994) ⁶⁰²	South Australia	20 lawyers, 22 judicial officers, and 427 crime victims	Interviews and surveys	Interviews were undertaken with the justice professionals, and surveys with the crime victims, about the effect of impact statements on the criminal justice process, the effect of the statements on victim satisfaction with the criminal justice system, and the effect of impact statements on sentencing outcomes.
Davis and Smith (1994) ⁶⁰³	New York	293 victims	Interviews	Victims of felonies, excluding sexual offences, were either offered the option of a victim impact statement or were not. They were subsequently interviewed regarding their satisfaction levels with the justice system.
Hoyle, Cape, Morgan, and	England and Wales	298 victims	Interviews	90% of interviews were conducted by telephone,

⁶⁰² Edna Erez, Leigh Roeger and Frank Morgan, *Victim Impact Statements in South Australia: An Evaluation* (Office of Crime Statistics, South Australian Attorney-General's Department, 1994).

⁶⁰³ Robert C Davis and Barbara E Smith, 'Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?' (1994) 22(1) *Journal of Criminal Justice* 1.

Sanders (1998) ⁶⁰⁴				with the remainder done face-to-face, regarding victims' decisions to opt in to the new victim statement and/or 'one-stop shop' schemes, and their experiences of those schemes as well as the criminal justice system generally.
Erez and Rogers (1999) ⁶⁰⁵	South Australia	20 lawyers, 22 judicial officers, and 427 crime victims	Interviews	This study analysed the same interview data as in Erez, Roeger and Morgan's 1994 research.
Erez and Laster (1999) ⁶⁰⁶	South Australia	20 lawyers, 22 judicial officers, and 427 crime victims	Interviews	This study analysed the same interview data as in Erez, Roeger and Morgan's 1994 research.
Konradi and Burger (2000) ⁶⁰⁷	California	34 victims	Interviews	The first of only two research studies to focus specifically on sentencing experiences of victims of sexual assault.
South Australian Government (2000) ⁶⁰⁸	South Australia	222 victims	Interviews	Structured interviews were undertaken by telephone to elicit information about access to information for victims of crime, victim impact

⁶⁰⁴ Carolyn Hoyle et al, *Evaluation of the 'One Stop Shop' and Victim Statement Pilot Projects* (Home Office, Research Development and Statistics Directorate, 1998).

⁶⁰⁵ Edna Erez and Linda Rogers, 'Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals' (1999) 39(2) *British Journal of Criminology* 216.

⁶⁰⁶ Edna Erez and Kathy Laster, 'Neutralizing Victim Reform: Legal Professionals' Perspectives on Victims and Impact Statements' (1999) 45 *Crime and Delinquency* 530.

⁶⁰⁷ Amanda Konradi and Tina Burger, 'Having the Last Word An Examination of Rape Survivors' Participation in Sentencing' (2000) 6(4) *Violence Against Women* 35.

⁶⁰⁸ South Australian Government 'Survey of Victims of Crime' (Justice Strategy Unit, 2000).

				statements and criminal injuries compensation, counselling and other services for victims of crime.
Meredith and Paquette (2001) ⁶⁰⁹	Canada	41 victims	Focus groups	The groups were designed to research how victim impact statements were meeting their intended purposes and how they might be improved.
Department of Justice Canada (2005) ⁶¹⁰	Canada	1878 justice professionals, and 112 crime victims	Surveys and Interviews	1664 surveys were administered to criminal justice professionals and 214 interviews were conducted with a subset of the same group. The survey asked about a wide range of issues concerning the criminal justice system, including the recent legislative changes allowing victim impact statements. Victim interviews were conducted in order to obtain detailed data on each individual victim's experience in the criminal justice system.
Herman (2005) ⁶¹¹	USA	22 victims	Interviews	Participants were victims of childhood sexual offending, adult sexual offending, and domestic violence. They were interviewed about their perceptions of justice.
Regehr and	Canada	14 justice	Interviews	The interviews sought to

⁶⁰⁹ Colin Meredith, Chantal Paquette and Canada Department of Justice, *Summary Report on Victim Impact Statement Focus Groups* (Policy Centre for Victim Issues, 2001).

⁶¹⁰ Department of Justice Canada, *Multi-Site Survey of Victims of Crime and Criminal Justice Professionals across Canada* (Policy Centre for Victim Issues, 2005).

⁶¹¹ Judith Lewis Herman, 'Justice From the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571.

Alaggia (2006) ⁶¹²		professionals		better understand the potential for healing of victims of sexual violence in the criminal justice system.
Schuster and Proppen (2006) ⁶¹³	Minnesota	22 judges, and 15 victim advocates	Interviews	The interviews sought to determine to what extent victim impact statements affected or should affect sentencing decisions and acceptance of plea negotiations, particularly in domestic violence or sexual assault cases, and what features make an impact statement persuasive or memorable.
Leverick, Chalmers and Duff (2007) ⁶¹⁴	Scotland	202 victims, 2 judges, and 27 justice professionals	Interviews	Telephone and face-to-face interviews were undertaken to establish the extent to which the pilot schemes were working effectively and to inform the decision on whether victim statement schemes should be rolled out across Scotland.
Du Mont, Miller and White (2008) ⁶¹⁵	Canada	15 social workers	Interviews	Interviews were undertaken regarding participants' knowledge of victim impact statements and their perceptions of the implementation, effects, and value of the statements.

⁶¹² Cheryl Regehr and Ramona Alaggia, 'Perspectives of Justice for Victims of Sexual Violence' 2006(1) *Victims and Offenders* 33.

⁶¹³ Mary Lay Schuster and Amy Proppen, *Victim Impact Statement Study* (WATCH, 2006).

⁶¹⁴ Fiona Leverick, James Chalmers and Peter Duff, *An Evaluation of the Pilot Victim Statement Schemes in Scotland* (Scottish Executive Social Research, 2007).

⁶¹⁵ Janice Du Mont, Karen-Lee Miller and Deborah White, 'Social Workers' Perspectives on the Victim Impact Statements in Cases of Sexual Assault in Canada' (2008) 18(3) *Women and Criminal Justice* 1.

Victim Support Agency (2009) ⁶¹⁶	Victoria	605 victims	Surveys	The survey was designed to provide information to assist in evaluating the implementation of the Victorian Victims' Charter. Questions were asked about all aspects of the Charter. This study excluded victims of sexual assault.
ACT Government (2009) ⁶¹⁷	Australian Capital Territory	7 victims	Interviews	The interviews were designed to ascertain the victims' experiences of the criminal justice system, but did not focus on impact statement experiences.
Englebrecht (2011) ⁶¹⁸	New York	44 justice professionals, and 28 family victims	Interviews	The interviews examined the perspectives of criminal justice personnel and victims on victim participation in the criminal justice system.
Erez, Ibarra and Downs (2011) ⁶¹⁹	Midwest USA	27 justice professionals, and 7 victims-turned-activists	Interviews	The interviews asked participants how victims fare during the various stages of the criminal justice process.
Commissioner for Victims and Witnesses in England and	England and Wales	30 victims	Telephone interviews and group	The interviews were designed to examine victims' relationship with the criminal justice

⁶¹⁶ Victorian Victim Support Agency, 'A Victim's Voice: Victim Impact Statements in Victoria' (Victorian Government, October 2009).

⁶¹⁷ ACT Government, *A Rollercoaster Ride: Victims of Sexual Assault: Their Experiences With and Views About the Criminal Justice Process in the ACT* (2009).

⁶¹⁸ Christine M Englebrecht, 'The Struggle for "Ownership of Conflict": An Exploration of Victim Participation and Voice in the Criminal Justice System' (2011) 36(2) *Criminal Justice Review* 129.

⁶¹⁹ Edna Erez, Peter R Ibarra and Daniel M Downs, 'Victim Welfare and Participation Reforms in the United States: A Therapeutic Jurisprudence Perspective' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Carolina Academic Press, 2011).

Wales (2011) ⁶²⁰			interviews	process, their views on the sentencing and how these factors affected them.
Miller (2013) ⁶²¹	Canada	11 victims, 20 victim support workers, 2 lawyers, and 4 feminist advocates	Interviews	This study was the second of only two research projects to focus on sentencing experiences of victims of sexual offending. It looked at the ways that victims use their impact statements in court, other than as a means to inform the judge of the harm they had experienced.
Miller (2014) ⁶²²	Canada	11 victims, 20 victim support workers, 2 lawyers, and 4 feminist advocates	Interviews	This used the same interview data as the 2013 article but focused instead on the way that harm caused by sexual offending can also affect the families of victims.
Victorian Government (2014) ⁶²³	Victoria	57 lawyers, 43 police prosecutors, 41 judicial officers, and 24 victims	Surveys, interviews and focus groups	Surveys were undertaken with justice professionals and interviews and focus groups were conducted with victims. The research focused on the use of victim impact statements in Victoria, and sought to identify issues that could be raised by participants.
Lens, Pemberton, Brans, Braeken,	Netherlands	143 victims	Surveys and interviews	The research looked at the emotional recovery of crime victims after they

⁶²⁰ Commissioner for Victims and Witnesses in England and Wales, *Victims' Views of Court and Sentencing* (2011).

⁶²¹ Karen-Lee Miller, 'Purposing and Repurposing Harms: The Victim Impact Statement and Sexual Assault' (2013) 23(11) *Qualitative Health Research* 1445.

⁶²² Karen-Lee Miller, 'Relational Caring: The Use of the Victim Impact Statement by Sexually Assaulted Women' (2014) 29(5) *Violence and Victims* 797.

⁶²³ Victorian Department of Justice, *Victim Impact Statement Reforms in Victoria Interim Implementation Report* (Victorian Government, June 2014).

Bogaerts and Lahlah (2015) ⁶²⁴				submit their victim impact statement. Victims were asked to fill in a survey before and after trial, and were subsequently interviewed 4 weeks later.
Tait (2015) ⁶²⁵	New South Wales	55 victims, and 35 victim support workers	Telephone and face-to-face interviews	Telephone interviews were undertaken with 55 victims of a range of types of offending. The research sought to determine whether some categories of victim are better, or more poorly, served by the impact statement process. Face-to-face interviews were undertaken with victim support workers on the same issues.
Booth (2015) ⁶²⁶	New South Wales	14 family victims	Interviews	Interviews were undertaken with family victims of homicide who had submitted victim impact statements.

⁶²⁴ Kim ME Lens et al, 'Delivering a Victim Impact Statement: Emotionally Effective or Counterproductive?' (2015) 12(1) *European Journal of Criminology* 17.

⁶²⁵ Fiona Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victim Service Professionals* (Masters Thesis, University of Sydney, 2015).

⁶²⁶ Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2015).

APPENDIX 2:

TABLE OF CASE CHARACTERISTICS BY JURISDICTION

I ACT

Case Name	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
<i>Agresti</i> [2016] ACTSC 9	One count of rape ⁶²⁷	Y, colleague	2803	9	Trial	Y	N	N
<i>Ballantyne</i> (Unreported, ACTSC, 1 April 2014)	One count of rape	Not stated	1558	12	Trial	Y	Y	Y
<i>Dhaimat</i> (Unreported, ACTSC, 12 March 2014)	Two counts act of indecency	Y, medical doctor	908	N/A	Trial	N	N	Not stated
<i>Gj</i> [2014] ACTSC 186	One count act of indecency	Y, colleague	2901	13	Plea	Y	N	Y
<i>Hile</i> [2015] ACTSC 236	Three counts of assault with intent to commit an act of indecency; three counts of commit an act	N	2501	9	Plea	Y	N	Y

⁶²⁷ The offence of sexual intercourse with a person who does not consent is called 'sexual intercourse without consent' in the ACT under the *Crimes Act 1900* (ACT) s 55, 'rape' in South Australia under *Criminal Law Consolidation Act 1935* (SA) s 48, 'rape' under *Criminal Code Act 1924* (Tas) Schedule 1 s 335, and 'rape' under *Crimes Act 1958* (Vic) s 58. To achieve consistency, the term 'rape' is used to describe this category of offending across all of the jurisdictions.

Case Name	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
	of indecency							
<i>Hill</i> [2015] ACTSC 289	One count of rape	N, escort	2927	4	Plea	Y	N	Y
<i>Joyce</i> (Unreported, ACTSC, 5 February 2014)	Two counts of rape; one count of inflicting actual bodily harm on a person with the intention of engaging in sexual intercourse	N	3268	4	Trial	Y	N	Y
<i>Kaczmarek</i> [2015] ACTSC 160	One count of attempting to commit an act of indecency; one count of unlawful assault with intent to commit an act of indecency	N	2711	N/A	Plea	N	N	Not stated
<i>Kim</i> [2015] ACTSC 182	13 counts of committing an act of indecency	N	1435	2	Plea	Y	N	Not stated
<i>Kindl</i> [2015] ACTSC 128	One count of act of indecency	Y, acquaintance	2681	3	Plea	Y	N	Y
<i>Livas</i> [2015] ACTSC 50	One count of rape	N, escort	3034	9	Plea	Y	N	Y
<i>March</i> [2014] ACTSC 244	One count of rape	N	3172	20	Plea	Y	Y	Y
<i>NQ</i> [2015] ACTSC 308	One count of act of indecency; one count of unlawful assault with intent to engage in sexual intercourse	Y, wife	1562	N/A	Plea	N	N	N

Case Name	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
<i>Sila</i> [2015] ACTSC 64	Two counts of rape	Y, ex-wife	1502	9	Plea	Y	N	Not stated
<i>Singh and Singh</i> [2014] ACTSC 250	One count of abduction with intent to rape; one count of act of indecency; numerous counts of rape	Y, acquaintance	6561	4	Trial	Y	N	Y
<i>Sirohi</i> [2015] ACTSC 252	Two counts of rape	N, taxi driver	2158	4	Plea	Y	N	Y
<i>Sordini</i> [2015] ACTSC 45	One count of rape	Y, friend	4726	9	Plea	Y	N	Y
<i>SP</i> [2015] ACTSC 121	One count of rape	Y, friend	2998	4	Plea	Y	Y	Y
<i>Stanley</i> [2015] ACTSC 322	Two counts of rape	Y, partner	5058	12	Plea	Y	N	Y
<i>Tamawiwiy</i> [2015] ACTSC 371	Two counts of rape; one count of act of indecency	N	4079	6	Plea and trial	Y	N	Y
<i>Taylor</i> [2015] ACTSC 43	One count of rape	Not stated	5762	6	Plea	Y	N	Y
<i>US</i> [2016] ACTSC 130	One count of sexual assault in the second degree; three counts of sexual intercourse without consent; one count of attempted	N	5996	4	Plea	Y	Y	Y

Case Name	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
	sexual intercourse without consent							

II SOUTH AUSTRALIA

Case	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
<i>Belcher</i> (Unreported, SADC, 17 August 2015)	One count of rape	Y, friend	1615	10	Plea	Y	N	Y
<i>Chehayeb</i> (Unreported, SADC, 29 June 2015)	Indecent assault	N	2221	4	Trial	Y	N	Y
<i>Cox</i> (Unreported, SADC, 22 August 2016)	One count of rape	Y, acquaintance	3431	7	Plea	Y	N	Y
<i>Duncan</i> (Unreported, SADC, 6 November 2014)	One count of rape; one count of indecent assault	N	544	3	Trial	Y	N	Not stated
<i>F, K</i> (Unreported, SADC, 30 June 2016)	One count of rape	Y, step-sister	2318	22	Plea	Y	Y	Y
<i>Golding</i>	One count of indecent assault	N	2151	N/A	Plea	N	N	Not stated

Case	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
(Unreported, SADC, 2 March 2016)								
<i>Gray</i> (Unreported, SADC, 8 August 2014)	One count of rape	Y, friend	1346	4	Plea	Y	N	Not stated
<i>Kelly</i> (Unreported, SADC, 17 November 2015)	One count of attempted rape	Y, ex-partner	1979	10	Plea	Y	N	Y
<i>Kennedy</i> (Unreported, SADC, 27 April 2016)	Four counts of rape	Y, acquaintance	2057	6	Trial	Y	N	Y
<i>Kenny</i> (Unreported, SADC, 24 June 2016)	One count of indecent filming	Y, colleague	6803	7	Plea	Y	Y	Y
<i>Knight</i> (Unreported, SADC, 11 November 2015)	Two counts of rape	N	1683	18	Plea	Y	N	Y
<i>Kubsch</i> (Unreported, SADC, 6 February 2015)	One count of rape	N	1113	8	Plea	Y	N	N
<i>Mould</i> (Unreported, SADC, 7 May 2015)	One count of rape	Y, niece	1644	10	Trial	Y	N	Y
<i>Naicker</i> (Unreported, SADC,	One count of indecent assault	Y, friend	944	3	Plea	Y	N	Not stated

Case	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
10 October 2014)								
<i>Pelly</i> (Unreported, SADC, 28 August 2014)	One count of rape	N, escort	467	3	Trial	Y	N	Y
<i>Perara-Cathcart</i> (Unreported, SADC, 29 October 2014)	One count of rape	Y, acquaintance	1226	13	Trial	Y	N	Y
<i>Perkins</i> (Unreported, SADC, 26 June 2015)	One count of rape	Y, colleague	2121	6	Trial	Y	N	Y
<i>Scrivener</i> (Unreported, SADC, 6 June 2014)	One count of indecent assault	Y, friend	893	9	Plea	Y	N	Y
<i>Singh</i> (Unreported, SADC, 5 June 2014)	Two counts of indecent assault	N, taxi driver	930	7	Plea	Y	N	Y
<i>Thorpe</i> (Unreported, SADC, 14 April 2016)	Two counts of rape	Y, ex-partner	2511	1	Trial	Y	N	Not stated
<i>Veit</i> (Unreported, SADC, 1 October 2015)	One count of rape	Y, colleague	1252	12	Plea	Y	N	Y
<i>Willis</i> (Unreported, SADC, 17 November 2014)	One count of rape	Y, colleague	1443	5	Plea	Y	N	Y

III TASMANIA

Case	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
<i>AGB</i> (Unreported, TASSC 28 January 2015)	One count of indecent assault	Y, step-daughter	2071	N/A	Plea	N	N	N
<i>BAS</i> (Unreported, TASSC 20 August 2014)	Two counts of indecent assault; one count of attempted rape; one count of aggravated sexual assault	Y, wife	2712	9	Trial	Y	Y	Y
<i>Craig</i> (Unreported, TASSC 26 May 2016)	One count of rape	Y, friend	2006	15	Trial	Y	N	Not stated
<i>Graham</i> (Unreported, TASSC 15 April 2015)	One count of rape	Y, acquaintance	1206	7	Plea	Y	Y	N
<i>Guerra</i> (Unreported, TASSC 25 September 2014)	One count of indecent assault	Y, acquaintance	1028	9	Plea	Y	N	Y
<i>KRR</i> (Unreported, TASSC 6 August 2015)	One count of rape	Y, wife	1494	9	Plea	Y	Y	Y
<i>Mulholland</i> (Unreported, TASSC 7 April 2016)	One count of rape	Y, acquaintance	1497	15	Trial	Y	N	Y

Case	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
<i>NHC</i> (Unreported, TASSC 9 December 2015)	One count of rape	Y, ex-partner	1504	42	Trial	Y	N	Y
<i>PB</i> (Unreported, TASSC 7 December 2015)	One count of aggravated sexual assault	Y, partner	963	3	Plea	Y	N	Y
<i>QMT</i> (Unreported, TASSC 11 May 2015)	One count of rape; one count of attempted rape	Y, ex-partner	2254	7	Plea	Y	N	Y
<i>RCC</i> (Unreported, TASSC 29 August 2015)	One count of rape; one count of indecent assault	Y, acquaintance	1241	15	Trial	Y	N	Y
<i>RJB</i> (Unreported, TASSC 21 April 2016)	One count of aggravated sexual assault; one count of rape	Y, acquaintance	8567	2	Plea	Y	N	Y
<i>RSJ</i> (Unreported, TASSC 15 May 2015)	Two counts of aggravated sexual assault; one count of attempted rape	Y, wife	1963	10	Plea	Y	N	Y
<i>SGH</i> (Unreported, TASSC 9 June 2016)	One count of rape	Y, friend	1179	10	Plea	Y	N	Y
<i>SMK</i> (Unreported, TASSC 29 May 2014)	One count of aggravated sexual assault	Y, ex-partner	1226	12	Plea	Y	N	Y

Case	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
<i>Wilson</i> (Unreported, TASSC 11 August 2016)	Two counts of rape	N	560	31	Trial	Y	N	Y

IV VICTORIA

Case	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
<i>Alexander</i> [2016] VCC 668	One count of rape	Y, acquaintance	3184	9	Plea	Y	N	Y
<i>Barbat</i> [2014] VCC 42	Three counts of indecent assault	Y, partner	4316	9	Plea	Y	N	Y
<i>Bayley</i> [2015] VCC 698	Five counts of rape; two counts of indecent assault	N, escort	8705	10	Trial	Y	N	Y
<i>Cashion</i> [2014] VCC 222	One count of indecent assault	Y, acquaintance	3898	6	Plea	Y	N	Y
<i>Charleston</i> [2014] VCC 1856	One count of rape	Y, wife	4491	5	Plea	Y	N	Y
<i>Chase</i> [2015] VCC 669	One count of rape	Y, friend	1916	7	Plea	Y	Y	Y

Case	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
<i>Cook</i> [2015] VCC 895	Six counts of rape	Y, partner	4798	11	Trial	Y	N	Y
<i>Daglas</i> [2015] VCC 1038	One count of rape	Y, ex-partner	4341	3	Trial	Y	N	N
<i>Dhankar</i> [2015] VCC 189	One count of procuring sexual penetration by fraud	N	2676	10	Plea	Y	N	Y
<i>Ferguson</i> [2014] VCC 1993	Two counts of rape	Y, ex-partner	4226	4	Plea	Y	N	Y
<i>Field</i> [2015] VCC 955	One count of indecent assault; one count of attempted rape	N	6760	5	Plea	Y	N	Y
<i>Foley</i> [2016] VCC 321	One count of sexual assault	Y, ex-partner	7238	1	Plea	Y	N	N
<i>Grasserbauer</i> [2016] VCC 343	One count of rape	Y, ex-partner	2751	6	Plea	Y	N	Y
<i>Hewitt</i> [2014] VCC 1222	One count of indecent assault	Y, friend	2313	4	Trial	Y	Y	Y
<i>Hewlett</i> [2015] VCC 1245	One count of indecent assault	Y, acquaintance	2687	3	Plea	Y	N	Y
<i>Hoogerland</i> [2016] VCC 230	One count of rape	Y, partner	2973	6	Trial	Y	N	Y
<i>Inia</i> [2016] VCC 271	Two counts of rape	Y, partner	1716	8	Trial	Y	N	Y

Case	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
<i>JF</i> [2016] VCC 235	One count of indecent assault	N	4445	7	Plea	Y	N	Y
<i>Johns</i> [2015] VCC 840	Six counts of rape	Y, wife	1304	6	Trial	Y	N	Y
<i>Maude</i> [2014] VCC 1727	One count of rape; one count of indecent assault	Y, partner	4280	10	Plea	Y	N	Y
<i>McLachlan</i> [2015] VCC 1164	One count of rape	Y, ex-partner	4819	7	Plea	Y	N	Y
<i>Milano</i> [2015] VCC 713	One count of indecent assault	N	3096	2	Plea	Y	N	N
<i>Mitchell</i> [2014] VCC 415	Two counts of indecent assault	Y, acquaintance	1374	12	Plea	Y	N	Y
<i>Mullett</i> [2016] VCC 761	One count of rape	Y, ex-partner	3121	8	Plea	Y	Y	Y
<i>Panckow</i> [2014] VCC 163	Three counts of indecent assault	Y, friend	2438	6	Plea	Y	N	Y
<i>Patel</i> [2016] VCC 194	One count of rape	N	2227	11	Plea	Y	Y	Y
<i>Pham</i> [2014] VCC 569	Two counts of indecent assault; one count of rape	Y, acquaintance	3047	2	Trial	Y	N	Not stated
<i>Pirimapun</i> [2014] VCC 520	One count of indecent assault;	N	6025	6	Trial	Y	N	Y

Case	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
	one count of rape							
<i>Ramlagun</i> [2014] VCC 270	Two counts of indecent assault; one count of rape	Y, acquaintance	2691	11	Trial	Y	N	N
<i>Reid</i> [2015] VCC 1304	One count of indecent assault; one count of indecent act; one count of rape	N	4641	9	Plea	Y	Y	Y
<i>Richards</i> [2016] VCC 113	One count of rape	Y, acquaintance	2667	4	Trial	Y	Y	Y
<i>Sadaka</i> [2015] VCC 343	One count of rape	N	2677	10	Trial	Y	Y	Y
<i>Sheriff</i> [2014] VCC 2128	Three counts of procuring sexual penetration by fraud	Y, acquaintance	1646	8	Plea	Y	N	Y
<i>Silva</i> [2016] VCC 414	Two counts of indecent assault	Y, friend	1899	7	Plea	Y	N	Y
<i>Singh</i> [2014] VCC 1504	Two counts of indecent assault; one count of rape	N	4732	3	Trial	Y	N	Y
<i>Tan</i> [2014] VCC 1910	One count of rape	Y, client	5474	5	Plea	Y	N	Y
<i>Taupau</i> [2015] VCC 239	One count of indecent assault	N	3329	2	Plea	Y	N	N

Case	Sexual Offence Category	Victim known to offender?	Remarks Word Count	% Mention Victim	Plea or Trial?	Mention Victim Harm?	Mention Victim Family?	Was VIS submitted?
<i>Theodoropoulos</i> [2015] VCC 602	Five counts of rape	Y, acquaintance	3911	11	Trial	Y	N	Y
<i>Vacek</i> [2015] VCC 484	One count of rape	Y, ex-partner	5885	5	Plea	Y	N	Y
<i>Warne</i> [2014] VCC 733	One count of rape	Y, wife	3412	4	Plea	Y	N	Y

APPENDIX 3:

AVAILABILITY OF SENTENCING REMARKS IN AUSTRALIA

Jurisdiction (Court)	Remarks publically available?	Website published	Period of time available	Available through subscription?	Available on AustLII?	Period of time available
ACT (Supreme Court)	Yes	Supreme Court of the ACT ⁶²⁸	2008 - present	Yes ⁶²⁹	Yes ⁶³⁰	1986 - present
NSW (District Court)	Yes	NSW CaseLaw ⁶³¹	1999 - present	Yes ⁶³²	Yes ⁶³³	1992 - present
NSW (Supreme Court)	Yes	NSW CaseLaw ⁶³⁴	1999 - present	Yes ⁶³⁵	Yes ⁶³⁶	1993 - present

⁶²⁸ Supreme Court of the Australian Capital Territory, *Judgments* <<http://www.courts.act.gov.au/supreme/judgment>>.

⁶²⁹ ACT Justice and Community Safety Directorate and the Judicial Commission of NSW, *Australian Capital Territory Sentencing Database* <<https://actsd.judcom.nsw.gov.au>>.

⁶³⁰ AustLII, *Supreme Court of the ACT* <<http://www.austlii.edu.au/au/cases/act/ACTSC>>.

⁶³¹ New South Wales Courts and Tribunals, *Browse decisions* <<https://www.caselaw.nsw.gov.au/browse>>.

⁶³² Judicial Commission of New South Wales, *Judicial Information Research System* <<https://jirs.judcom.nsw.gov.au>>.

⁶³³ AustLII, *District Court of New South Wales* <<http://www.austlii.edu.au/au/cases/nsw/NSWDC>>.

⁶³⁴ New South Wales Courts and Tribunals, *Browse decisions* <<https://www.caselaw.nsw.gov.au/browse>>.

⁶³⁵ Judicial Commission of New South Wales, *Judicial Information Research System* <<https://jirs.judcom.nsw.gov.au>>.

⁶³⁶ AustLII, *Supreme Court of New South Wales* <<http://www.austlii.edu.au/au/cases/nsw/NSWSC/>>.

Jurisdiction (Court)	Remarks publically available?	Website published	Period of time available	Available through subscription?	Available on AustLII?	Period of time available
Northern Territory (Supreme Court)	Yes	Supreme Court of the NT ⁶³⁷	Approximately 3 months	Yes ⁶³⁸	No	N/A
Queensland (District Court)	No	N/A	N/A	Yes ⁶³⁹	No	N/A
Queensland (Supreme Court)	Yes	Queensland Supreme Court Library ⁶⁴⁰	Approximately 4 weeks	Yes ⁶⁴¹	No	N/A
South Australia (District Court)	Yes	SA Courts Administration Authority ⁶⁴²	Approximately 4 weeks	No	No	N/A
South Australia (Supreme Court)	Yes	SA Courts Administration Authority ⁶⁴³	Approximately 4 weeks	No	No	N/A

⁶³⁷ Supreme Court of the Northern Territory, *Latest Sentencing Remarks* <<http://www.supremecourt.nt.gov.au/remarks>>.

⁶³⁸ Northern Territory Government, *NT Courts Sentencing Database* <<http://ntsentsencing.nt.gov.au>>.

⁶³⁹ Supreme Court Library Queensland and the Judicial Commission of New South Wales, *Queensland Sentencing Information Service* <<https://www.sentencing.sclqlld.org.au>>.

⁶⁴⁰ Supreme Court Library Queensland, *Supreme Court – Trial Division* <<http://www.sclqlld.org.au/caselaw/QSC>>.

⁶⁴¹ Supreme Court Library Queensland and the Judicial Commission of New South Wales, *Queensland Sentencing Information Service* <<https://www.sentencing.sclqlld.org.au>>.

⁶⁴² Courts Administration Authority of South Australia, *District Court - Sentencing Remarks* <<http://www.courts.sa.gov.au/SentencingRemarks/Pages/District-Court.aspx>>.

⁶⁴³ Courts Administration Authority of South Australia, *Supreme Court - Sentencing Remarks* <<http://www.courts.sa.gov.au/SentencingRemarks/Pages/Supreme-Court.aspx>>.

Jurisdiction (Court)	Remarks publically available?	Website published	Period of time available	Available through subscription?	Available on AustLII?	Period of time available
Tasmania (Supreme Court)	Yes	Supreme Court of Tasmania Sentencing Database ⁶⁴⁴	2008 - present	No	No	N/A
Victoria (County Court)	Yes	Victorian County Court: Decisions of Note ⁶⁴⁵	2012 – present	No	Yes ⁶⁴⁶	1993 - present
Victoria (Supreme Court)	Yes	N/A	N/A	No	Yes ⁶⁴⁷	1994 – present
Western Australia (District Court)	No	N/A	N/A	No	No	N/A
Western Australia (Supreme Court)	Yes	Supreme Court of Western Australia ⁶⁴⁸	Approximately 1 month	Yes ⁶⁴⁹	No	N/A

⁶⁴⁴ Tasmanian Government, *Supreme Court of Tasmania Sentences 2008* - <<http://catalogues.lawlibrary.tas.gov.au/textbase/SentSearch.htm>>.

⁶⁴⁵ County Court of Victoria, *Decisions of Note* <<https://www.countycourt.vic.gov.au/decisions-of-note>>.

⁶⁴⁶ AustLII, *County Court of Victoria* <<http://www.austlii.edu.au/au/cases/vic/VCC>>.

⁶⁴⁷ AustLII, *Supreme Court of Victoria* <<http://www.austlii.edu.au/au/cases/vic/VSC/>>.

⁶⁴⁸ Supreme Court of Western Australia, *Sentences – by Citation Number* <<http://decisions.justice.wa.gov.au/supreme/supSR.nsf/main.xsp>>.

⁶⁴⁹ Legal Practice Board of Western Australia Law Library, Practitioners Legal Electronic Access Service <<http://www.scwalawlibrary.com.au/members.html>>.

APPENDIX 4:
PROJECT INFORMATION SHEET
FOR VICTIM PARTICIPANTS

VICTIM IMPACT STATEMENT AND SENTENCING RESEARCH PROJECT INFORMATION SHEET FOR VICTIM PARTICIPANTS

Dear <Name>,

You are invited to take part in a research project that is being conducted in partial fulfillment of the requirements for a PhD for Ms Rhiannon Davies (University of Tasmania Ph: (03) 6226 2068; email: rhiannon.davies@utas.edu.au), under the supervision of Professor Kate Warner (University of Tasmania Ph: (03) 6226 2067; email: kate.warner@utas.edu.au) and Ms Terese Henning (University of Tasmania Ph: (03) 6226 2079; email: terese.henning@utas.edu.au).

What is the purpose of this research?

The purpose of this research is to investigate the sentencing experiences of female victims of sexual offending who have completed a victim impact statement. This includes identifying any issues you may have encountered with completing and submitting your victim impact statement, or any issues that you may have experienced at the sentencing hearing.

Why have I been invited to participate?

We are inviting you to participate in this research because your support worker has identified you as somebody who has been a victim of a sexual offence, and who has submitted a victim impact statement to court. You can participate in this research even if you did not attend court in person for the trial or the sentencing hearing.

Any participation in this research is voluntary and that there are no consequences if you decide not to participate. Any decision not to participate will not affect your relationship with the University of Tasmania.

What will I be asked to do?

If you are interested in participating in this research, your support worker will provide your details to the researchers, which will enable them to contact you to talk with you about participating.

If you agree to participate, you will be asked to provide the researchers with a copy of your victim impact statement. If you do not have a copy of this statement, we will ask for your permission to obtain a copy from your support worker.

We will also ask you to participate in a recorded interview about your experiences of preparing and submitting your victim impact statement, and about your experiences of the sentencing process. Your interview will occur at the victims services office, and your support worker can be present at your interview to provide you with support if you require it. The interview should take no more than one hour, and you are welcome to take breaks during the interview, or end the interview at any time that you wish.

The interview will be recorded and transcribed for analysis, with the recording destroyed as soon as the transcription is complete. The transcript and the copy of your impact statement will be stored on secure servers at the University of Tasmania, and will be accessible only to the researchers.

None of your personal information will be identifiable when published. Any information obtained from the interview transcript or from your victim impact statement will be anonymised when stored. You will be provided with the opportunity to review the transcript for the purpose of correction.

Are there any possible benefits from participation in this study?

Your participation will assist the researchers to make recommendations to judges about the best possible practice for acknowledgement of victims and their impact statements during the sentencing process.

You may also find it therapeutic to some extent to discuss with the researcher the process of preparing and submitting your victim impact statement and your experiences of the sentencing process.

Are there any possible risks from participation in this study?

You may experience some distress when discussing your experience of the process of preparing and submitting your victim impact statement, or when discussing the sentencing process. If you do feel distressed during the interview, you may take a break, or end the interview, at any time that you wish.

Your support worker can be present at any time during the interview to provide assistance to you if required. If you feel any distress outside of business hours after the interview, you may wish to contact the following services:

1800 RESPECT (1800 737 732) is a 24 hour confidential telephone and online counselling service, staffed by professional counsellors to assist any person who has experienced sexual assault. Online counselling is also available at <https://www.1800respect.org.au>

Lifeline Australia has a 24 hours crisis telephone service (phone 13 11 14) as well as an online chat service between the hours of 8pm to midnight (Australian Eastern Standard Time) 7 days a week and this service can be accessed via <http://www.lifeline.org.au/Find-Help/Online-Services/crisis-chat>

BeyondBlue (1300 22 4636) has a 24 hour helpline 7 days per week as well as an online chat service between the hours of 4pm to 10pm 7 days per week which

can be accessed via <http://www.beyondblue.org.au/get-support/get-immediate-support>

What if I change my mind during or after the study?

You are free to withdraw from the research at any time, and you may do so for any reason. If you choose to withdraw, you are under no obligation to explain why you have decided to do so.

If you choose to withdraw from the research, any data you have provided will be able to be removed from the study prior to the anonymisation of your interview transcript. The transcript will be anonymised after you have had the chance to review the transcript for the purpose of correction. It will not be possible to remove data from the study after this date.

What will happen to the information when this study is over?

Any data collected will be kept for a period of five years from the date of first publication. After this time it will be destroyed. Any physical data will be kept in a locked filing system at the University of Tasmania Faculty of Law. Any electronic data will be stored on password protected facilities at the University of Tasmania. All data will be accessible only by the researchers involved in this study.

All data will be treated in a confidential manner. Any data collected from your victim impact statement or your interview will be completely de-identified, and will be anonymised when published.

How will the results of the study be published?

A summary of the research findings of the interview process will be prepared after analysis has occurred, and will be accessible from <http://www.utas.edu.au/law/victim-impact-research>. Please note that the research is not expected to be finalised until March 2017.

As mentioned above, you will not be identifiable in any of the published material.

What if I have questions about this study?

If you have any questions about the research, please contact Ms Rhiannon Davies (Ph: (03) 6226 2068; email: rhiannon.davies@utas.edu.au), or Professor Kate Warner (Ph: (03) 6226 2067; email: kate.warner@utas.edu.au).

This study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 6226 6254 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number H0014988.

APPENDIX 5:
CONSENT FORM
FOR VICTIM PARTICIPANTS

VICTIM IMPACT STATEMENT AND SENTENCING RESEARCH PROJECT CONSENT FORM FOR VICTIM PARTICIPANTS

I _____ agree to participate in a research
project entitled:
(name of participant)

The Victim's Perspective: Exploring Judicial Acknowledgment of Victim Impact at Sentencing in Sex Offence Cases

1. I agree to take part in the research study named above.
2. I have read and understood the Information Sheet for this study.
3. The nature and possible effects of the study have been explained to me.
4. I understand that this study involves supplying the researchers with a copy of my victim impact statement. If I no longer have a copy of my victim impact statement, I give permission to the researchers to request a copy from my support worker.
5. I understand that this study involves participating in a recorded interview regarding my experiences of the process of preparing and submitting a victim impact statement, and of the sentencing process generally.
6. I understand that participation involves the risk(s) that recounting my experience of the sentencing process may cause me some distress. I understand that my support worker will be available during the time of the interview, and can be present at the interview if I request. I understand that I may take a break during the interview, or end the interview at any time that I wish.
7. I understand that the researcher(s) will maintain confidentiality and that any information I supply to the researcher(s) will be used only for the purposes of the research.
8. I agree to the publication of results from this study, and I understand that before publication, any information that might identify me will be removed.

9. I understand that all research data will be securely stored on the University of Tasmania premises for 5 years after the final reports and publications have been produced for this project and that this data will then be destroyed.
10. I understand that my participation is voluntary and that I may withdraw at any time without any effect.
11. I understand that I will be sent a copy of the transcript of interview for correction if necessary. I understand that if I so wish, I may request that any information I have supplied be withdrawn from the research at the time that I review the transcript.
12. I understand that after the transcript has been reviewed for correction, the information within the transcript will be anonymised and it will no longer be possible to request that my data be withdrawn from the research.

Signature: _____ **Date:** _____

Statement by Investigator

I have explained the project and the implications of participation in it to this volunteer and I believe that the consent is informed and that she understands the implications of participation.

Signed by Investigator: _____ **Date:** _____

APPENDIX 6:
PROJECT INFORMATION SHEET
FOR JUSTICE PROFESSIONAL PARTICIPANTS

VICTIM IMPACT STATEMENT AND SENTENCING RESEARCH PROJECT INFORMATION SHEET FOR STAKEHOLDER PARTICIPANTS

Dear Sir/Madam,

You are invited to take part in a research project that is being conducted in partial fulfillment of the requirements of a PhD for Ms Rhiannon Davies (University of Tasmania Ph: (03) 6226 2068; email: rhiannon.davies@utas.edu.au), under the supervision of Professor Kate Warner (University of Tasmania Ph: (03) 6226 2067; email: kate.warner@utas.edu.au) and Ms Terese Henning (University of Tasmania Ph: (03) 6226 2079; email: terese.henning@utas.edu.au).

What is the purpose of this research?

The purpose of this research is to investigate the sentencing experiences of female victims of sexual offending who have completed a victim impact statement. This includes identifying whether victims who have completed an impact statement have any commonly identified issues with completing and submitting their statement, or have experienced any commonly identified issues with the sentencing hearing process itself.

Why have I been invited to participate?

You have been invited to participate in this research because of your experience in the area of sex offence matters.

Any participation in this research is voluntary. There are no consequences if you decide not to participate. Any decision not to participate at any stage in the research will not affect your relationship with the researchers or the University of Tasmania.

What will I be asked to do?

You will be asked to participate in a recorded interview about your experiences of working with victims in preparing and submitting their victim impact statement, and about your experiences of the sentencing process in sex offence cases.

Your interview will occur at a mutually agreeable venue. It is anticipated that the interview will take no more than one hour, and you are welcome to pause or terminate the interview at any time that you wish.

If, after your interview has taken place, the researchers have any follow up questions about your experiences of working with victims in preparing and submitting their victim impact statement, or about your experiences of the

sentencing process in sex offence cases, you may be contacted by the researchers to request your further participation in a second recorded interview.

The interview(s) will be recorded and transcribed for analysis, with the recording destroyed as soon as the transcription is complete. The transcript(s) will be stored on secure servers at the University of Tasmania, and will be accessible only to the researchers.

None of your personal information will be identifiable when published. Any information obtained from the interview transcript(s) will be anonymised when stored. You will be provided with the opportunity to review the transcript(s) for the purpose of correction.

Are there any possible benefits from participation in this study?

Your participation will assist the researchers to make recommendations to judges about the best possible practice for acknowledgement of victims and their impact statements during the sentencing process.

Are there any possible risks from participation in this study?

There are no foreseeable risks from participation in the study.

What if I change my mind during or after the study?

You are free to withdraw from the research at any time, and you may do so for any reason. If you choose to withdraw, you are under no obligation to explain why you have decided to do so.

If you choose to withdraw from the research, any data you have provided will be able to be removed from the study prior to the anonymisation of your interview transcript(s). The transcript(s) will be anonymised after you have had the chance to review them for the purpose of correction. It will not be possible to remove data from the study after this date.

What will happen to the information when this study is over?

Any data collected will be kept for a period of five years from the date of first publication. After this time it will be destroyed. Any physical data will be kept in a locked filing system at the University of Tasmania Faculty of Law. Any electronic data will be stored on password protected facilities at the University of Tasmania. All data will be accessible only by the researchers involved in this study.

All data will be treated in a confidential manner. Any data collected from your interview will be de-identified, and will be anonymised when published.

How will the results of the study be published?

The results of the study will be published within Ms Rhiannon Davies' PhD thesis. The results may also be published within scholarly articles or presented at academic conferences.

A summary of the research findings of the interview process will be prepared after analysis has occurred, and will be accessible from <http://www.utas.edu.au/law/victim-impact-research>. A copy of these findings will also be emailed to you. Please note that the research is not expected to be finalised until March 2017.

What if I have questions about this study?

If you have any questions about the research, please contact Ms Rhiannon Davies (Ph: (03) 6226 2068; email: rhiannon.davies@utas.edu.au), or Professor Kate Warner (Ph: (03) 6226 2067; email: kate.warner@utas.edu.au)

This study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 6226 6254 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number H0014988.

APPENDIX 7:
CONSENT FORM
FOR JUSTICE PROFESSIONAL PARTICIPANTS

**VICTIM IMPACT STATEMENT AND SENTENCING RESEARCH PROJECT
CONSENT FORM FOR STAKEHOLDER PARTICIPANTS**

I _____ agree to participate in a research
project entitled:
(name of participant)

**The Victim's Perspective: Exploring Judicial Acknowledgment of Victim
Impact at Sentencing in Sex Offence Cases**

1. I agree to take part in the research study named above.
2. I have read and understood the Information Sheet for this study.
3. The nature and possible effects of the study have been explained to me.
4. I understand that this study involves participating in a recorded interview regarding my experiences of victim impact statements and sentencing process.
5. I understand that in the event that the researchers have follow-up questions, I may be contacted after my interview has taken place with a request to participate in a further recorded interview regarding my experiences of victim impact statements and sentencing process.
6. I understand that there may be some inconvenience in participating in this study and that there are no foreseeable risks in doing so.
7. I understand that the researcher(s) will maintain confidentiality and that any information I supply to the researcher(s) will be used only for the purposes of the research.
8. I agree to the publication of results from this study provided details that might identify me are removed.
9. I understand that all research data will be securely stored on the University of Tasmania premises for 5 years after the final reports and publications have been produced for this project and that this data will then be destroyed.

10. I understand that my participation is voluntary and that I may withdraw at any time without any effect.

11. I understand that I will be sent a copy of the transcript of interview for correction if necessary. I understand that if I so wish, I may request that any data I have supplied be withdrawn from the research at the time that I review the transcript.

12. I understand that after the transcript has been reviewed for correction, the information within the transcript will be anonymised and it will no longer be possible to request that my data be withdrawn from the research.

Signature: _____ **Date:** _____

Statement by Investigator

I have explained the project and the implications of participation in it to this volunteer and I believe that the consent is informed and that he/she understands the implications of participation.

Signed by Investigator: _____ **Date:** _____

APPENDIX 8:

VICTIM PARTICIPANT INTERVIEW SCHEDULE

Introductory matters

- Thank the participant for attending the interview
- Introduce the researcher
- Explain the purpose and method of research
- Provide assurances as to privacy of participant
- Remind the participant that they are free to terminate or pause the interview at any time
- Confirm consent to record interview

Victim Impact Statement Questions

- How did you first become aware that you were able to prepare and submit your VIS?
- Were you encouraged to prepare your VIS or was it presented more as just an option available to you?
- What information were you given about the purpose and use of VIS? Who gave you this information?
- What is your understanding of what a VIS is supposed to do?
- Why did you decide to submit your VIS?
- What type of information did you include in your VIS?
- Were you told of any restrictions to the information you could provide in your VIS? If so, what?
- In your opinion, what was the most important information that you included in your VIS? Why was this important to you?
- What happened to your VIS after you completed it?
- Were any parts of your VIS changed? By whom? How did this make you feel?

- Did you attend court to submit your VIS? Why? Why not?
- Did you read your VIS aloud? Why? Why not?
- How did the process of presenting your VIS to court make you feel?
- Were you questioned by a defence lawyer on the content of your VIS? If so, how did this make you feel?
- If you didn't read your VIS to the court do you know how it was presented? Were you happy with the way it was presented?

Sentencing Questions

- Were you present at court when the offender was sentenced? Why? Why not?
- Did the judge refer to your VIS in sentencing? How did this make you feel?
- Did the judge otherwise refer to you in sentencing? How did this make you feel?
- In general, did the judge make you feel that they had considered your VIS as part of the sentencing process? Why? Why not? How did this make you feel?
- Did the judge make reference to the information within your VIS that you considered to be the most important? How did this make you feel?
- Were you provided with any information about sentencing beforehand, such as the purposes of sentencing? What were you told?
- Were you informed about sentencing rules and procedures, such as aggravating and mitigating factors prior to sentencing? What were you told?
- Were there any factors in relation to the defendant that the judge took into account in sentencing that you agreed with? What were they? Why?
- Were there any factors in relation to the defendant that the judge took into account in sentencing that you disagreed with? What were they? Why?

- Were there any factors that the judge didn't take into account at sentencing that you believe should have been taken into account? What were they? Why?

Concluding Questions

- Were you sent or did you read the judge's sentencing remarks after the case was finalised?
- How did you feel about the sentence given in the case?
- How did you feel about the sentencing process generally?
- Was it important to you to be involved in the sentencing process?
- Did you feel that the sentencing judge treated you with respect and recognition? Why? Why not?
- Did submitting your VIS give you a sense of satisfaction? Why? Why not?
- How did you feel overall about submitting your VIS?
- Would you recommend that others submit a VIS or would you do it again? Why? Why not?

APPENDIX 9:

JUSTICE PROFESSIONAL INTERVIEW SCHEDULE

Introductory matters

- Introduce the researcher and explain the purpose and method of research
- Provide assurances as to privacy of participant
- Remind the participant that they are free to terminate or pause the interview at any time
- Confirm consent to record interview

Impact Statement Questions

- How long have you been working in your role?
- How many victims have you dealt with in that time?
- How would a victim generally come into contact with your service?
- How much contact do you have or how much time is spent with a victim prior to the trial?
- How long does there tend to be between the offender being charged and the trial taking place?
- How long does there tend to be between the verdict or plea and the sentencing hearing?
- What information do you provide victims with about the trial process?
- What information do you provide victims with about the sentencing process?
- When do you inform victims of their right to prepare and submit a VIS?
- What information do you provide victims about the purpose of and use of VIS by the court?
- Do you inform victims of any restrictions to the information they can provide in their VIS? If so, what do you say?
- At what point in time does the victim prepare their VIS?

- What happens to a victim's VIS after they complete it?
- Is it common that parts of a VIS are changed? By whom? How does this make the victim feel? How do you feel about this?
- In what ways do VIS tend to be submitted to court?
- Do you encourage victims to attend court to submit their VIS? Why? Why not?
- Do you encourage victims to read their VIS aloud? Why? Why not?
- In your view, does the process of verbal presentation of a VIS tend to affect victims differently to the presentation of written VIS? If so, how?
- Are victims often questioned by a defence lawyer on the content of their VIS? If so, how often? And how does this make them feel? How do you feel about this?
- Do you recommend that all victims with whom you work submit a VIS? Why? Why not?

Sentencing Questions

- Do you encourage victims to be present in court when the offender is sentenced? Why? Why not?
- Experience of victims being upset by mitigating factors?
- Do judges often refer to the VIS in sentencing? How does this make victims feel? How do you feel about this?
- If there is no VIS submitted, do judges tend to otherwise refer to victims in sentencing? How does this make victims feel? How do you feel about this?
- How much information do you provide victims with about sentencing before the hearing, such as information regarding the purposes of sentencing? What do you say?
- Do you inform victims about sentencing rules and procedures, such as information about aggravating and mitigating factors prior to sentencing? What do you say? If not, why not?

Concluding Questions

- Are you sent or do you read the judge's sentencing remarks after cases are finalised?
- Is it important to you that victims be involved in the sentencing process? Why? Why not?
- Did you feel that judges treat victims with respect and recognition? Why? Why not?
- How do you feel overall about the process of submitting a VIS and the sentencing process?